TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 666.

HENRY C. PETTIT, UNITED STATES MARSHAL FOR THE DISTRICT OF INDIANA, APPELLANT,

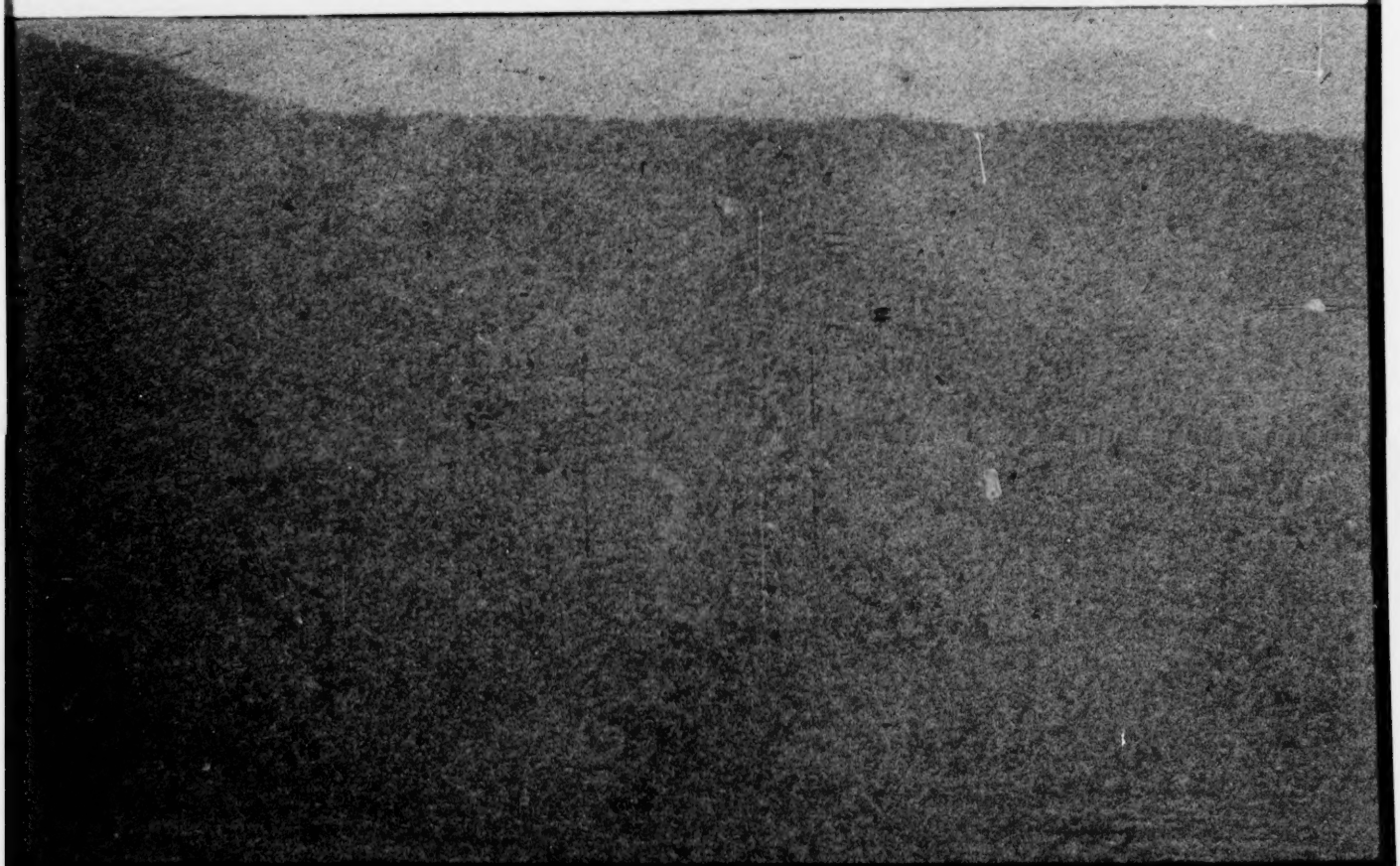
vs.

THOMAS WALSHE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED JANUARY 22, 1904.

(19214.)



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1 Chancery.—United States of America.

To THOMAS WALSHE, *greeting:*

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., thirty days after the date hereof, pursuant to an appeal which has been allowed by the circuit court of the United States for the district of Indiana, from its final decree in a suit wherein Joseph B. Kealing, United States district attorney for the district of Indiana, on behalf of Henry C. Pettit, United States marshal for the district of Indiana, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Francis E. Baker, judge of the circuit court of the United States for the district of Indiana, this 14th day of December, in the year of our Lord one thousand nine hundred and three.

[SEAL.] FRANCIS E. BAKER, *Judge.*

1½ On this day of , in the year of our Lord one thousand eight hundred and , personally appeared before me, the subscriber, and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the day of , A. D. 189 .

I received this writ at Indianapolis Dec. 17, 1903, and served on Henry Spaan, as attorney of record for the within-named Thomas Walshe, by reading to and in his hearing, and at same time and place delivered to him, a true copy of this writ, at Indianapolis, Marion County, Indiana, Dec. 17, 1903.

HENRY C. PETTIT, *U. S. Marshal,*
By ALONZO BUYD, *Deputy.*

2 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house in the city of Indianapolis, in said district, on the first Tuesday in May, in the year of our Lord one thousand nine hundred and three, before the Honorable Francis E. Baker, judge of said circuit court.

In the matter of the petition of Thomas Walshe. No. 10250, petition for writ of habeas corpus.

Be it remembered that heretofore, to wit, at the May term of said court, on the 8th day of September, 1903, before the Honorable Francis E. Baker, judge of said court, the following proceedings in the above-entitled cause were had, to wit:

Comes now the petitioner herein, Thomas Walshe, in person and by his attorneys and files his petition for a writ of habeas corpus directed to Henry C. Pettit, United States marshal for the district of Indiana, commanding him to forthwith produce in court the body of said Thomas Walshe that the cause of his detention by said marshal may be inquired

into, and thereupon the court orders that said writ be issued returnable forthwith and the same is now issued. And said petition and writ are in the words and figures following, to wit:

To Hon. FRANCIS E. BAKER,
Judge of the Circuit Court of the United States
for the District of Indiana:

The petition of Thomas Walshe respectfully shows:

That he is now imprisoned and restrained of his liberty by Henry C. Pettit, marshal of the United States for the district of Indiana, at the Marion County jail, of the city of Indianapolis, in said district.

That your petitioner is thus imprisoned and held in custody
3 under color of the authority of the Constitution and laws of the United States, relating to the return of fugitives from justice to foreign countries with which the United States has concluded treaties of extradition.

That said Henry C. Pettit, asserts that he has the right to hold in custody and imprison your petitioner under and by virtue of a certain warrant of arrest issued by one John A. Shields, said to be a United States commissioner appointed by the district court of the United States for the southern district of New York, and also a commissioner to execute the act of Congress entitled, "An act for giving effect to certain treaty stipulations between this and foreign Governments, for the apprehension and delivery of certain offenders," approved August 12, 1848, and the several acts amendatory thereof, of which warrant a true copy is hereto attached marked "Exhibit A."

That said imprisonment is illegal and in violation of the Constitution and laws of the United States for the following reasons:

First. It is asserted by the said marshal that said warrant is authorized by and issued under and pursuant to section 5270 of the Revised Statutes of the United States, being section 1 of the act of August 12th, 1848, entitled "An act for giving effect to certain treaty stipulations between this and foreign Governments, for the apprehension and delivery of certain offenders," as amended by the act of June 6, 1900. Whereas your petitioner shows and charges that the said warrant being for the arrest and detention of a person alleged to have been convicted of crime, is not authorized by said statute, or any other statute or law of the United States.

Second. That said warrant does not constitute authority by virtue of said statute, or any other law of the United States, for the arrest or detention elsewhere than in the southern district of New York
4 of the person whose arrest and detention is thereby directed; whereas your petitioner was arrested thereunder and is detained in the district of Indiana, of which district he was, and still is, an inhabitant and resident.

Third. That the said warrant does not constitute sufficient authority for the arrest and detention of the person whose arrest and detention is thereby ordered, by any other officer or person than the marshal of the United States for the southern district of New York, or a deputy or other person duly authorized by said marshal.

Whereas your petitioner was not arrested and is not detained thereunder by said marshal, or any deputy or other person authorized by him,

but has been arrested and is detained thereunder by the said marshal of the United States for the district of Indiana.

Fourth. That the said warrant orders that the persons therein directed to be arrested be brought before said John A. Shields, commissioner, at his office, room # 78, in the post-office building in the city of New York, in order that evidence of criminality of said person may be heard and considered, etc. And the said marshal of the United States for the district of Indiana, having arrested your petitioner as the person directed to be arrested thereby, is holding your petitioner under arrest for the purpose of taken him out of the district of Indiana to said southern district of New York.

Whereas your petitioner being an inhabitant and resident of the district of Indiana, and having been arrested therein, is entitled to have the questions of his identity with the person directed to be arrested by said warrant, and of his conviction of crime, as alleged in said warrant, and of his criminality heard and determined in said district of Indiana, before a judge or United States commissioner, or other magistrate, having jurisdiction to hear and determine such matters within said district.

5 Fifth. That your petitioner is not James Lynchehaun, the person directed by said warrant to be arrested and detained.

Sixth. It is not shown by said warrant that the same was issued upon a complaint made by the Government of the Kingdom of Great Britain and Ireland, or by any officer or person authorized in respect thereto by said Government, or that the said James Lynchehaun or your petitioner had in fact committed the crime of which it is alleged he had been convicted.

Seventh. That in and by the said warrant it is shown that the same was issued upon a complaint filed before the said John A. Shields, commissioner, on or prior to the 6th day of June, 1903, on which date the said warrant was issued.

Whereas your petitioner shows that thereafter, on the 24th day of August, 1903, the identical person by whom the said complaint was made before said Commissioner Shields, acting under and pursuant to the same authority, appeared in the district of Indiana before Charles W. Moores, who was then and there a United States commissioner appointed by the district court of the United States for the district of Indiana and authorized to discharge and perform all of the duties required by the provisions of section 5270 of the Revised Statutes of the United States, and to that end to execute the act of Congress entitled "An act for giving effect to certain treaty stipulations between this and foreign kingdoms for the apprehension and delivery of certain offenders," approved August 12, 1848, and of the several acts amendatory thereof, and made complaint, under oath, wherein it was alleged that theretofore and on or about the 15th day of July, in the year 1895, at the general assizes and general goal delivery of the county of Mayo, in that part of the United Kingdom of Great Britain and Ireland called Ireland, and within the jurisdiction of his said Britannic Majesty, held at Castlebar, in said

county, before the Right Honorable Mr. Justice Gibson, a justice
6 of said court, one James Lynchehaun was convicted of having on the 6th day of October, 1894, feloniously and unlawfully wounded one Agnes McDonnell with intent thereby, then feloniously

and of his malice aforethought her, the said Agnes McDonnell, to kill and murder, and was by the said court sentenced to be kept in penal servitude for his natural life, and was thereafter, under and by virtue of such judgment and sentence of said court, committed to Maryborough convict prison in Queens County, in Ireland; and that on or about the 6th day of September, in the year 1902, before the said sentence had been executed, the said James Lynchehaun did escape from the said Maryborough prison and is now at large, and that said sentence of said James Lynchehaun has never been executed; and that the said James Lynchehaun is a fugitive from the justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States of America; and that the said crime for which the said James Lynchehaun was so aforesaid convicted and sentenced is named and specified in the treaty between the United States and Great Britain; and thereupon asked that a warrant be issued for the apprehension of said James Lynchehaun, and that he be brought before the said United States commissioner to the end that evidence of his criminality be heard and considered, and that on such hearing such action be taken in the premises as law and justice may require, in order that said James Lynchehaun might be surrendered to the proper authorities of the said Kingdom of Great Britain and Ireland to be further dealt with according to law and in accordance with the treaties and laws in that behalf made.

That thereupon the said United States Commissioner Moores issued his warrant directed to the marshal of the United States for the district of Indiana, and delivered the same to said marshal whereby he was commanded to arrest said James Lynchehaun and bring him before
7 said commissioner to the end that evidence of criminality of the said James Lynchehaun might be heard and considered in order that if sufficient to sustain the charge further proceedings might be had for his surrender to the authorities of the Kingdom of Great Britain and Ireland as an escaped convict.

Your petitioner avers and shows that the said James Lynchehaun referred to in the said complaint made to said United States Commissioner Moores, and in said warrant issued by him thereon, is the same James Lynchehaun referred to in the complaint made to said Commissioner Shields and in the warrant issued thereon by him, and that the crime and conviction thereof and escape from the sentence pronounced thereon set forth in the complaint made to said Commissioner Moores and the warrant issued by him thereon is the same, and not other or different, as the crime, conviction, and escape alleged and set forth in the said complaint made to and warrant issued thereon by said Commissioner Shields.

Wherefore, your petitioner charges that by the institution of the said proceedings before said Commissioner Moores, the said complaint made to said Commissioner Shields and the warrant issued thereon were abandoned and quashed, and the said warrant did not thereafter and does not now constitute any authority for the arrest and detention of your petitioner.

Wherefore, your petitioner prays that a writ of habeas corpus may issue out of the circuit court of the United States for the district of Indiana, to the said Henry C. Pettit, to produce the body of your peti-

tioner before said court, at some convenient time to be therein designated, there to abide what shall be awarded by the court in the premises, and that your petitioner may be discharged from said imprisonment.

THOS. WALSHE.

DISTRICT OF INDIANA,
County of Marion, ss:

8 On this 8th day of September, in the year 1903, before me personally appeared Thomas Walsh, the above-named petitioner, and being by me duly sworn, made oath that the foregoing petition by him subscribed is true in substance and in fact.

NOBLE C. BUTLER,
Clerk U. S. District Court, Dist. of Indiana.

The President of the United States to any marshal of the United States, to the deputies of any such marshal, or any or either of them:

Whereas complaint has been made on oath under the treaty between the United States and Her late Majesty, the Queen of Great Britain and Ireland, concluded and signed at Washington on the 9th day of August, 1842, and of the supplementary treaty between the same high contracting parties, signed July 12th, 1889, before me, John A. Shields, one of the commissioners appointed by the district court of the United States for the southern district of New York, and also a commissioner appointed to execute the act of Congress entitled "An act for giving effect to certain treaty stipulations between this and foreign Governments, for the apprehension and delivery of certain offenders," approved August 12, 1848, and the several acts amendatory thereof; that heretofore and on or about the 15th day of July, in the year 1895, at the general assizes and general goal delivery for the county of Mayo, in that part of the United Kingdom of Great Britain and Ireland called Ireland, and within the jurisdiction of His said Britannic Majesty, held at Castlebar in said county, before the Right Honourable Mr. Justice Gibson, a justice of said court, one James Lynchehaun was convicted of having on the 6th day of October, 1894, feloniously and unlawfully wounded one Agnes McDonnell

9 with intent thereby, then feloniously and of his malice aforethought, he, the said Agnes McDonnell, to kill and murder, and was by the said court sentenced to be kept in penal servitude for his natural life, and was thereafter under and by virtue of said judgment and sentence of said court committed to the Maryborough convict prison in Queens County in Ireland, and that on or about the 6th day of September, in the year 1892, before the said sentence had been executed, the said James Lynchehaun did escape from the said Maryborough prison and is now at large, and the said sentence of the said James Lynchehaun has never been executed, and that the said James Lynchehaun is a fugitive from the justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States of America, and that the said crime for which the said James Lynchehaun was so, as aforesaid, convicted and sentenced is named and specified in the treaty between the United States and Great Britain.

Now, therefore, we command you forthwith to take the said James Lynchehaun and bring him before me, the said commissioner, at my office, room 78, in the P. O. building, in the city of New York, in order that

evidence of the criminality of the said James Lynchehaun may be heard and considered, and if deemed sufficient to sustain the charge, that the same may be certified together with a copy of all the proceedings to the Secretary of State, that a warrant may issue for his surrender pursuant to said treaty.

Witness my hand and official seal this 6 day of June, in the year 1903.

U. S. commissioner for the southern district of New York, and commissioner duly authorized for the district court of the United States for the southern district of New York to act as commissioner under the laws of the United States concerning the extradition of fugitives from justice of a foreign government, under a treaty or convention between this and any foreign government.

10 UNITED STATES OF AMERICA,
District of Indiana, ss:

The President of the United States to Henry C. Pettit, marshal of the United States for the district of Indiana, greeting:

Whereas by petition of Thomas Walshe, duly verified and filed in the office of the clerk of the circuit court of the United States for the district of Indiana, it is alleged that you have in your custody and do unlawfully detain and restrain from his liberty the said Thomas Walshe:

You are commanded that you do produce the body of said Thomas Walshe before the Honorable Francis E. Baker, judge of said circuit court, at Indianapolis, forthwith, with the cause of his detention, there to do, receive, and submit to whatever the said judge shall order in this behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Indianapolis, this 8th day of September, A. D. 1903.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

And now comes the United States marshal, in person and by Joseph B. Kealing, esq., United States attorney, and produces in court the body of said Thomas Walshe. And this cause is now continued for further hearing until 9 o'clock to-morrow morning.

And afterwards, to wit, at the May term of said court, on the 9th day of September, 1903, before the Honorable Francis E. Baker, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the marshal of the United States for said district and files his answer herein, in the words following, to wit:

11 To Hon. FRANCIS E. BAKER,
Judge of the Circuit Court of the United States for the District of Indiana.

Henry C. Pettit, United States marshal for the district of Indiana, for answer to the petition of Thomas Walsh, for release from custody of said marshal, says that as said marshal he has arrested and is holding in custody said petitioner, under and by virtue and authority of a certain warrant, a true copy of which, marked "Exhibit A," is filed with and made

a part of said petition; that said warrant in due course came to hand for service as alleged in said petition on the 4th day of September, 1903, and was duly served upon petitioner on the 8th day of September, 1903, at Indianapolis, Indiana; that said warrant is regular, legal, valid, and sufficient in law in all respects to legally justify and warrant the arrest and detention of petitioner, and, under the laws of the United States, it was and is the duty of this defendant to arrest and detain said petitioner, and deliver him as commanded by said writ for hearing before Commissioner Shields, in New York City; that said writ runs for service in the State of Indiana, although issued by a commissioner of the United States for the southern district of New York, by reason of its being a writ in extradition; that defendant is informed and believes, and therefore states the fact to be, that petitioner is the identical person commanded to be arrested by said warrant as James Lynchehaun; that a true and complete copy of said warrant is attached to petitioner's petition, marked "A," and made a part thereof, and that it is by virtue and authority solely of said warrant that defendant holds and detains petitioner; that defendant proposes, if not otherwise ordered by this honorable court, to obey, as United States marshal for the district of Indiana, the command of said warrant as set out therein, believing it to be his duty as said officer so to do.

Defendant further says that this answer is by way of return to the writ issued on petitioner's petition, and said "Exhibit A" is hereby referred to and made a part of this answer and return.

J. J. M. La Follette,
Atty. for Defendant.

12 Henry C. Pettit, being first duly sworn, upon his oath says he is the defendant in and to the foregoing petition, and the writ issued thereon, and that the matters and things stated in the above and foregoing answer and return to said writ and petition, are true, as he verily believes.

Henry C. Pettit.

Subscribed and sworn to before me this 9th day of September, 1903.

Noble C. Butler,
Clerk U. S. Dist. Court.

And afterwards, to wit, at the May term of said court, on the 10th day of September, 1903, before the Honorable Francis E. Baker, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the petitioner by counsel and files his exceptions to the return of the marshal herein, in the words following, to wit:

Exceptions of the above-named petitioner to the return of the respondent for insufficiency:

First exception. For that the said respondent has not by his said return set forth or shown any matter sufficient in law to justify his imprisonment and detention of your petitioner.

Second exception. For that the matters set forth and shown in the said return do not traverse or confess and avoid the matters set forth in the petition.

THOMAS WALSHE,
By H. N. SPAAN,
A. W. WISHARD,
A. C. HARRIS,
F. WINTER,
His Attorneys.

And said exceptions having been argued by counsel are now submitted to the court.

13 And afterwards, to wit, at the May term of said court, on the 11th day of September, 1903, before the Honorable Francis E. Baker, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

The exceptions to the return of the marshal upon the writ herein having been argued by counsel and submitted for the consideration of the court, and the court being duly advised in the premises, said exceptions are now sustained, and the marshal declining to amend his return or plead further it is ordered by the court that the prayer of the petition be, and the same is hereby, granted, and it is further ordered by the court that the petitioner be discharged from custody.

OPINION OF THE COURT.

BAKER, circuit judge (orally):

On the petition of Thomas Walshe, a writ of habeas corpus was issued in this case, and the return of the marshal justifies the detention of the *of the* petitioner by virtue of a writ issued by United States Commissioner Shields in the southern district of New York, addressed to any marshal of the United States, and commanding him to arrest and bring before the commissioner for hearing one James Lynchehaun as a person who had been convicted in Ireland of the offense of assault with intent to kill, and who had escaped with the sentence unexecuted.

The exceptions of the petitioner challenge the legality of this writ, which was the only justification set up in the return.

Passing over those objections that go to the formality of the writ, and the questions presented as to the scope that this hearing on habeas corpus might take, I come to the one question that seems to me controlling,

14 and that is, the power of the commissioner in the southern district of New York to issue a warrant upon which the marshal of this district may lawfully arrest the accused and return him to the court of the commissioner in New York. The solution of that question depends upon the terms of the existing treaties between this country and Great Britain and the statute of the United States enacted to carry the provisions of such treaties into effect. If a construction of the statute and treaties had been given by the Supreme Court of the United States to the effect that a commissioner of one district can cause the arrest of an accused person at any place he may be found within the sovereignty of the United States and brought to New York, I would be constrained to follow such an interpretation. No decision of the Supreme

Court to that effect has been cited, and my own examination of the authorities has failed to disclose one. Certain decisions in courts of the United States have been referred to. In the Henrich case, in 5 Blatchf. 414, 11 Fed. Cas., p. 1143, arising under the treaty of June 16, 1852, with Prussia, the language of Article I thereof being identical with Article X of the treaty of 1842 with Great Britain, it was expressly decided that a warrant issued and returnable in New York was legally served in the State of Wisconsin, and that the return of the accused person from Wisconsin to New York for the purpose of the extradition hearing was warranted by the treaty and statutes.

In the case of re Fergus, 30 Fed. Rep., 607, the Henrich case is referred to, but the question was not in any way involved in the case, and it does not appear that the court in that instance made an independent examination of the treaties and statutes for the purpose of forming and announcing a judgment of his own. The citation of the Henrich case in the Fergus case is simply a passing allusion.

The case of In re Berauch, 41 Fed., 472, is also referred to, but
15 in that case the question was not raised and decided, nor was the matter contained in the dictum in the view of the decision of the Henrich case. The Berauch case simply shows that the prisoner was brought forcibly from New Jersey to New York, and was discharged in New York because the showing against him was not sufficient. The case exhibits circumstances under which the question now presented might have been raised, but it was not.

In Grin v. Shine, 187 U. S., 181, the Henrich case is referred to on page 187. The observation is made that the Henrich case was vigorously contested because the warrant was executed without the limits of the district of New York and within the State of Wisconsin. There is no expression of opinion on the question whether the execution of the warrant in Wisconsin was lawful.

So that, as a matter of authority, the only case that has been presented or that I can find in which the question now presented is decided is the Henrich case. It is my duty to give to the decisions of the Federal courts in other circuits the weight and consideration to which they are entitled in view of the ability and learning of the judges who decided them, but they are not binding in this circuit as authorities and precedents, and finally are entitled to only such consideration as the reasoning of the case justifies. In the Henrich case I do not find any consideration given to some features of the treaty and statute that are controlling with me at this hearing, and, therefore, as a matter of authority and precedent I find myself compelled to be actuated solely by my own judgment as to the scope of the treaties and statute.

In Article X of the treaty of 1842 it was provided that the United States and the King of Great Britain, upon mutual requisitions, should deliver up to justice all persons who, being charged with certain specified crimes, should seek an asylum or should be found within the
16 territories of the other, provided that this shall be done only upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed. The petitioner in this case is charged with being an escaped convict. So far as the issues to be tried before the examining

magistrate that may arise upon the sufficiency of the record of conviction to be presented by the demanding Government are concerned, and so far as the determination of the issue made by the petitioner's denial that he is the person who was convicted is concerned, it is very clear to me that those issues would be controlled by Article X of the treaty of 1842 in connection with section 5270 of the statutes relating to extradition.

In the recent case of Wright v. Henker, 23 S. C. Rep., 581, it is very clearly determined that the representatives of the two Governments in making the treaties of 1842 and 1889 had respect to the dual form of the Government of the United States; of course, the treaty making power is with the national end of our duality, but it was competent for the National Government to make the test of the existence of extraditable crimes, and to make the test of the definition of the crime depend upon the State law; and in the treaty, as the words of the treaty themselves clearly indicate, the test of the right of the British Government to demand the return of an accused person was made to rest upon the law of the place where he was found—that place being determinable by the lines of the States, districts, and Territories that make up the United States, and I have no doubt that such is the situation with respect to the provinces and colonies of Great Britain, because the contracting parties referred to an accused person "who shall seek an asylum, or who shall be found within the territories of the other," and that the return could only
17 be had upon evidence sufficient, according to the laws of the place where the person shall be found, to justify his commitment if the offense had been committed there. And in section 5270, R. S., enacted to carry the provisions of extradition treaties into effect, the magistrates referred to may, upon complaint made under oath charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of the foreign government an extraditable crime, issued his warrant, etc. So that it is absolutely clear to my mind that the one nation was not dealing with the other merely as national entities. It was in that capacity only that they could execute the treaty, but each had regard to the situation of the other, and, on the part of the British Government, the dual character of our institutions is very clearly recognized. We have no common law crimes in this country. The penal code enacted by Congress is very limited. The great bulk of the crimes that are defined by the statutes are found in the penal codes of the States alone; and so if an accused person is found in Indiana and his return to Great Britain is demanded, the right of extradition stands upon whether or not the offence with which he is charged is an offence under the laws of Indiana. That is the substance of it, for it is made a condition upon which the return may be had, that the evidence of criminality shall be determined according to the law of the place where the person is found, and such as justify his commitment for trial if the crime or offense had there been committed. Article X of treaty of 1842.

If an offence is committed in Indiana of course it is contemplated by the law of Indiana that the preliminary hearing and the commitment for trial shall be in Indiana. Neither of the treaties nor the statute say in so many words that the hearing shall be had in the place where the accused party is found, but, inasmuch as the law of the place where he is found, not only with respect to the substantial definition of the
18 crime, but also with respect to the competency of witnesses and

the admissibility of evidence are made controlling, it was also intended that the hearing should be had at the place where he was found, particularly in view of the reference to the fact that the return is only justified under these circumstances that would warrant his commitment if the offence was committed in the jurisdiction where he was found. Of course, if an offense is committed there, his preliminary hearing must be had in that jurisdiction.

Now, returning to the Henrich case, I observe that the court thought it sufficient ground upon which to decide that the warrant was one that run throughout the United States to observe the fact that the extradition is arranged for by treaty between the two countries in their national capacity. Of course that is necessarily so. The treaty-making power is lodged in the national part of our institutions. But because the United States as a national entity alone has authority to make the treaty, it does not follow that the basis of returning people who are demanded under an extradition treaty is to be the national law, or under the national definition of crime. No attention was paid in the Henrich case to the fact, which has been thoroughly established by the courts, that the operative basis of extradition treaties is the law of the place where the accused person is found.

Now, while it is true that the court in New York may decide the question according to the law of Indiana, and, therefore, the decision of Wright v. Henkel is not conclusive upon the question now before the court, yet inasmuch as it would be necessary to have a person committed in Indiana for an offense in Indiana, before a magistrate of Indiana, I shall hold, until controlled by explicit legislation, or until the Supreme Court shall, by definite construction, declare that the makers of the treaty intended that an accused person, presumably innocent,
19 could be taken from Alaska to New York for the purpose of a preliminary hearing, or that an American citizen, presumably innocent, could be taken from Australia to London for the purpose of a hearing, that no such intention was within the view of the makers of this treaty and that they intended that when the basis of the extraditability of the crime was made the law of the place where he was found, that the hearing would be had there, similarly to the hearing where he would be committed for trial if the offense had been committed in the place where he was found.

So I will sustain the exceptions of the petitioner to the return of the marshal, and, as counsel for the British Government have indicated that they do not desire to amend, the petitioner may be discharged.

And afterwards, to wit, at the November term of said court, on the 20th day of November, 1903, before the Honorable Francis E. Baker, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now Joseph B. Kealing, esq., United States attorney, and files a petition for appeal and assignment of errors in the above-entitled cause in the words following, to wit:

Comes now Joseph B. Kealing, United States district attorney for the district of Indiana, and on behalf of the United States prays the court that the respondent, Henry C. Pettit, United States marshal for the

district of Indiana, be granted an appeal and writ of error from the decision and judgment of the court in the foregoing-entitled cause to the Supreme Court of the United States, and for all proper relief therein.

JOSEPH B. KEALING,
U. S. Attorney.

ASSIGNMENT OF ERRORS.

Comes now Henry C. Pettit, United States marshal and respondent in the above-entitled cause, and files his petition herein for an appeal
20 and writ of error to the Supreme Court of the United States, and assigns the following errors in said cause, to wit:

First. The court erred in sustaining the exceptions and each of them taken and filed to the return of the said respondent, Henry C. Pettit, to said writ of habeas corpus.

Second. The court erred in holding and deciding that a warrant for arrest in an extradition proceeding does not run and may not be served beyond the territorial limits of the district in which it is issued.

Third. That the judgment of the court that a warrant for arrest issued by a United States commissioner in the State of New York addressed to any United States marshal in any district of the United States was not sufficient authority to authorize the respondent, Henry C. Pettit, to arrest and hold the said Thomas Walshe, whose true name was James Lynchehaun, and in ordering the discharge and release of the said prisoner and in rendering judgment therefor in said cause was erroneous.

For which errors and each of them the said respondent prays that said judgment of the court be in all things reversed, and that judgment be entered for the respondent and for costs.

JOSEPH B. KEALING,
U. S. Attorney.

And thereupon it is ordered by the court that said appeal and writ of error be, and the same are hereby, granted.

21 UNITED STATES OF AMERICA,
District of Indiana, ss:

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in said court in the matter of the petition of Thomas Walshe for a writ of habeas corpus, filed and entered in said court, as fully as the same appears of record in my office.

Witness my hand and the seal of said court at Indianapolis, in said district, this 16th day of December, A. D. 1903.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

(Indorsement on cover:) File No. 19214. Indiana C. C., U. S. Term No., 563. Henry C. Pettit, United States marshal for the district of Indiana, appellant, vs. Thomas Walshe. Filed January 23rd, 1904. File No. 19214. Office of the clerk Supreme Court U. S. Received Dec. 19, 1903. Office of the clerk Supreme Court U. S. Received Jan. 23, 1904.

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FILE COPY. 33296

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 563.

Office Supreme Court U. S.
FILED
FEB 15 1904
JAMES H. McKENNEY,
Clerk

HENRY C. PETTIT, United States Marshal for the District of Indiana,
Appellant,

vs.

THOMAS WALSHE.

SIRS:

Please take notice a motion will be made, for the reasons and upon the grounds, hereto annexed, before the United States Supreme Court, at a session thereof to be held at the Capitol, in the City of Washington, D. C., on Tuesday, the 23rd day of February, 1904, at twelve o'clock, noon, or as soon thereafter as counsel can be heard, for a rule or order advancing this cause and setting it down for hearing and argument on a day to be fixed by the Court.

Dated, New York, February 8th, 1904.

Yours, etc.,

CHARLES FOX,
Attorney for Appellant, H. B. M.,
Consul General, at New York,
Office and Post-Office Address,
No. 3 Broad Street,
Borough of Manhattan,
New York City.

To

ADDISON C. HARRIS and FREDERICK WINTER, Esqs.,
Attorneys of Record, for Appellee.
HENRY C. PETTIT, Esq.,
Marshal of the United States for the District of Indiana, Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 563.

HENRY C. PETTIT, United States Marshal for the District of Indiana,

Appellant,

vs.

THOMAS WALSHE.

And now comes Sir Percy Sanderson, K. C. M. G., &c., &c., His Britannic Majesty's Consul General, at the Port of New York, appellant, of record, by Charles Fox, his counsel, and moves this Honorable Court to advance the above-entitled cause upon the calendar, and to set the same down for argument for a day certain.

The matter involved herein is an appeal from a final order of the Circuit Court of the United States, in and for the District of Indiana, granting a writ of *habeas corpus* to, and discharging the appellee, from custody, on the ground that the appellee was illegally apprehended, and held in custody by the Marshal of the United States for the District of Indiana, under a warrant issued upon a complaint of your applicant, under oath, by a commissioner in the Southern District of New York, duly authorized to act, under the provisions of Sec. 5270 of the Revised Statutes, and made returnable before the said Commissioner, in the Southern District of New York, in pro-

ceedings instituted for the extradition of the appellee, under the provisions of the extradition treaties between the United States and Great Britain, and holding that the appellee, under the said treaties and the laws of the United States, could only be apprehended and held in custody, in proceedings for his extradition, under and by a warrant made returnable in the District of Indiana.

That prior to the order appealed from, it was held that a warrant issued, in extradition proceedings, under the laws of the United States, could be executed anywhere, within the United States, and the person apprehended thereunder brought before the magistrate, in a State of the United States, other than the State in which he was apprehended, pursuant to the directions contained in the warrant. It was so held in the Henrich case, 5 Blatch., 414, decided in 1867, and this case has been referred to, and cited in subsequent cases, as an authority for such practice.

That warrants in extradition proceedings instituted by appellant, as the representative of his Government, have been executed in States of the United States, other than the State of New York, in which the warrant was issued and made returnable before a Commissioner, in the Southern District of New York, and a number of warrants in extradition proceedings, on behalf of other foreign Governments, have been likewise executed in States other than the one in which they were issued, and that this practice has existed for a number of years.

That within the jurisdiction of the Circuit Courts of the United States for the First and Second Circuits, it would appear, from the decisions of the Courts of the United States therein, that a warrant issued in extradition proceedings could be executed anywhere within the United States, which decisions are in conflict with the order ap-

pealed from herein, thus producing confusion and uncertainty as to the course to be adopted by representatives of foreign Governments in extradition proceedings, in obtaining warrants, where the person desired to be apprehended is without the residential district of the representative of the foreign Government, directed to institute the proceedings on behalf of his Government.

That the appellant has had, since the order appealed from herein, two cases, in which the persons were not within the State of New York, but in adjoining States, but their exact whereabouts could not be ascertained, and there is likely to arise at any time a proceeding for extradition, in which the appellant may be directed, as the representative of his Government, to institute proceedings for the extradition of a person to be found in a State of the United States other than the State of New York, where appellant has his office, and it is desirable that a speedy decision of this Honorable Court herein be obtained, that it may be conclusively determined and settled by this Honorable Court whether warrants in extradition proceedings are limited in their execution to the ~~territory~~ district wherein they are issued or made returnable.

Respectfully submitted,

CHARLES FOX,
Attorney for Appellant,
H. B. M., Consul General at
New York,
3 Broad Street,
New York.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 563.

HENRY C. PETTIT, United States Marshal for the District of Indiana,

Appellant,

vs.

THOMAS WALSHE.

BRIEF FOR H. B. M. CONSUL-GENERAL AT NEW YORK, APPELLANT.

This is an appeal from an order of the Circuit Court of the United States, for the District of Indiana, granting to the appellee his petition for a writ of *habeas corpus* and discharging him from custody (Rec., p. 8), upon the ground that the warrant by virtue of which he was arrested, issued by a Commissioner in New York, in an extradition proceeding, and made returnable before the Commissioner in the City of New York, could not be executed in the District of Indiana, and that, in an extradition proceeding, the warrant must be made returnable within the District or State, wherein the fugitive is found. (Rec., pp. 10-11.)

The appellee was arrested at Indianapolis, in the District of Indiana, by the United States Marshal of that district, under a warrant issued by Commissioner John A. Shields, in the Southern District of New York, which warrant reads as follows:

> "The PRESIDENT of the United States to any Marshal of the United States, to th Deputies of any such Marshal, or any c either of them:
>
> WHEREAS, complaint has been made on oath under the Treaty between the United States and Her late Majesty, the Queen of Great Britain and Ireland, concluded and signed at Washington, on the 9th day of August, 1842, and of the Supplementary Treaty between the same High Contracting Parties, signed July 12th, 1889, before me, John A. Shields, one of the Commissioners appointed by the District Court of the United States for the Southern District of New York, and also a Commissioner appointed to execute the Act of Congress, entitled 'An Act for Giving Effect to Certain Treaty Stipulations between this and Foreign Governments, for the Apprehension and Delivery of Certain Offenders.' Approved August 12th, 1848, and of the several acts amendatory thereof; that heretofore and on or about the 15th day of July in the year 1895, at the General Assizes and General Gaol Delivery for the County of Mayo, in that part of the United Kingdom of Great Britain and Ireland, called Ireland, and within the jurisdiction of His said Britannic Majesty, held at Castlebar, in said County, before the Right

Honorable Mr. Justice Gibson, a Justice of said Court, one James Lynchehaun, was convicted of having on the 6th day of October, 1894, feloniously and unlawfully wounded one Agnes McDonnell with intent thereby then feloniously and of his malice aforethought, *her* the said Agnes McDonnell to kill and murder, and was by the said Court, sentenced to be kept in penal servitude for his natural life, and was thereafter, under and by virtue of said judgment and sentence of said Court committed to the Maryborough Convict Prison, in Queens County, in Ireland, and that on or about the 6th day of September in the year *1902*, before the said sentence had been executed, the said James Lynchehaun did escape from the said Maryborough Prison, and is now at large, and the said sentence of the said James Lynchehaun has never been executed; and that the said James Lynchehaun is a fugitive from the Justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States of America, and that the said crime for which the said James Lynchehaun was so as aforesaid convicted and sentenced, is named and specified in the treaty between the United States and Great Britain.

NOW, THEREFORE, WE COMMAND YOU FORTHWITH, to take the said James Lynchehaun, and bring him before me, the said Commissioner, at my office, Room 78, in the P. O. Building in the City of New York, in order that the evidence of the criminality of the said James Lynchehaun may be heard and considered and if deemed sufficient to sustain the charge that the same may be certified, together with a copy of all the proceedings to the Secretary

of State, that a warrant may issue for his surrender pursuant to said treaty.

Witness my hand and official seal this 6th day of June, in the year 1903.

[Seal.] *John A. Shields.*

U. S. Commissioner for the Southern District of New York, and Commissioner duly authorized *by* the District Court of the United States for the Southern District of New York to act as Commissioner under the Laws of the United States concerning the extradition of fugitives from the justice of a foreign Government under a treaty or convention between This and any Foreign Government."

The copy in the record (p. 5) is not an exact copy. The differences are italicized; the appellant has the original present, for reference, upon the argument.

After his arrest, the appellee presented his petition to the Circuit Court of the United States for the District of Indiana, for a writ of *habeas corpus* and discharge from custody (Rec., p. 2); the portions of which, material to this appeal, are as follows:

"That he is now imprisoned and restrained of his liberty by Henry C. Pettit, marshal of the United States for the District of Indiana, at the Marion County jail, of the city of Indianapolis, in said District.

That your petitioner is thus imprisoned and held in custody under color of the authority

of the Constitution and laws of the United States, relating to the return of fugitives from justice to foreign countries with which the United States has concluded treaties of extradition.

That said Henry C. Pettit, asserts that he has the right to hold in custody and imprison your petitioner under and by virtue of a certain warrant of arrest issued by one John A. Shields, said to be a United States commissioner appointed by the District Court of the United States for the Southern District of New York, and also a commissioner to execute the act of Congress entitled, 'An Act for giving effect to certain treaty stipulations between this and foreign Governments, for the apprehension and delivery of certain offenders,' approved August 12, 1848, and the several acts amendatory thereof, of which warrant a true copy is hereto attached marked 'Exhibit A.'

That said imprisonment is illegal and in violation of the Constitution and Laws of the United States for the following reasons:

FIRST.—It is asserted by the said marshal that said warrant is authorized by and issued under and pursuant to Section 5270 of the Revised Statutes of the United States, being Section I of the Act of August 12th, 1848, entitled, 'An Act for giving effect to certain treaty stipulations between this and foreign Governments for the apprehension and delivery of certain offenders,' as amended by the Act of June 6, 1900; whereas your petitioner shows and charges that the said warrant, being for the arrest and detention of a person alleged to have been convicted of a crime, is

not authorized by said statute, or any other statute or law of the United States.

SECOND.—That said warrant does not constitute authority by virtue of said statute, or any other law of the United States, for the arrest or detention elsewhere than in the Southern District of New York, of the person whose arrest and detention is thereby directed; whereas your petitioner was arrested thereunder and is detained in the District of Indiana, of which District he was, and still is, an inhabitant and resident.

THIRD.—That the said warrant does not constitute sufficient authority for the arrest and detention of the person whose arrest and detention is thereby ordered, by any other officer or person than the Marshal of the United States for the Southern District of New York, or a deputy or other person duly authorized by said Marshal.

Whereas, your petitioner was not arrested and is not detained thereunder by said Marshal, or any Deputy or other person authorized by him, but has been arrested and is detained thereunder by the said Marshal of the United States for the District of Indiana.

FOURTH.—That the said warrant orders that the person therein directed to be arrested be brought before said John A. Shields, commissioner, at his office, Room #78, in the Post-Office building in the City of New York, in order that evidence of criminality of said person may be heard and considered, etc. And the said Marshal of the United States for the District of Indiana, having arrested your

petitioner as the person directed to be arrested thereby, is holding your petitioner under arrest for the purpose of taking him out of the District of Indiana to said Southern District of New York.

Whereas, your petitioner being an inhabitant and resident of the District of Indiana, and having been arrested therein is entitled to have the questions of his identity with the person directed to be arrested by said warrant, and of his conviction of crime, as alleged in said warrant, and of his criminality heard and determined in said District of Indiana, before a Judge or United States Commissioner, or other Magistrate, having jurisdiction to hear and determine such matters within said district.

FIFTH.—That your petitioner is not James Lynchehaun, the person directed by said warrant to be arrested and detained."

The U. S. Marshal for the District of Indiana filed an answer by way of return to the petition (Rec., pp. 6-7), setting forth that as said marshal he had arrested and was holding in custody the appellee, under and by virtue and authority of a certain warrant, a true copy of which was annexed to the petition, and then set forth:

"That said warrant in due course came to hand for service as alleged in said petition on the 4th day of September, 1903, and was duly served upon petitioner on the 8th day of September, 1903, at Indianapolis, Indiana; that said warrant is regular, legal, valid, and sufficient in law in all respects to legally just-

ify and warrant the arrest and detention of petitioner, and, under the laws of the United States, it was and is the duty of this defendant to arrest and detain said petitioner, and deliver him as commanded by said writ for hearing before Commissioner Shields, in New York City; that said writ runs for service in the State of Indiana, although issued by a commissioner of the United States for the Southern District of New York by reason of its being a writ in extradition; that defendant is informed and believes, and therefore states the fact to be, that petitioner is the identical person commanded to be arrested by said warrant as James Lynchehaun; that a true and complete copy of said warrant is attached to petitioner's petition, marked 'A,' and made a part thereof, and that it is by virtue and authority solely of said warrant that defendant holds and detains petitioner; that defendant proposes, if not otherwise ordered by this Honorable Court, to obey, as United States Marshal for the District of Indiana, the command of said warrant as set out therein, believing it to be his duty as said officer so to do."

Exceptions were filed to this return by the appellee, that it did not set forth or show any matter sufficient in law to justify his imprisonment and detention, and that the matters set forth in the return did not traverse, or confess and avoid, the matters set forth in the petition. (Rec., pp. 7-8.)

After argument, the Circuit Court sustained the exceptions, and ordered that the prayer of the petition be granted, and that the appellee be discharged from custody. (Rec., p. 8.)

The one question determined by the Court, and as expressed by the Court, controlling, was "the "power of a commissioner in the Southern Dis- "trict of New York to issue a warrant, upon which "the Marshal of this District may lawfully arrest "the accused, and return him to the Court of the "Commissioner in New York," and the Court held that the power did not exist, stating the reasons in the opinion of the Court. (Rec., pp. 8-11.) Reported in 125 Fed. R., 572.

The following errors were assigned in support of the appeal: (Rec., p. 12.)

> "First.—The Court erred in sustaining the exceptions, and each of them, taken and filed to the return of said respondent, Henry C. Pettit, to said Writ of Habeas Corpus.
>
> Second.—The Court erred in holding and deciding that a warrant for arrest in an extradition proceeding does not run, and may not be served, beyond the territorial limits of the District in which it is issued.
>
> Third.—That the judgment of the Court that a warrant for arrest, issued by a United States Commissioner, in the State of New York, addressed to any United States Marshal, in any District of the United States, was not sufficient authority to authorize the respondent, Henry C. Pettit, to arrest and hold the said Thomas Walshe, whose true name was James Lynchehaun, and in ordering the discharge and release of the said prisoner, and in rendering judgment therefor, in said cause, was erroneous."

The question presented by this record is an important one in extradition proceedings, and changes the law settled by a decision rendered, upwards of thirty-five years ago, that a legal warrant in these proceedings, wherever issued in the United States, could be executed in any part of the United States, and followed in practice, in this class of cases, until the decision, now here for review.

This appellant urges in support of the errors assigned:

I.—That a warrant, wherever issued in the United States, by any of the Justices, Judges or Commissioners enumerated in Section 5270 of the Revised Statutes, for the apprehension of a fugitive criminal of a foreign Government, with whom the United States has a treaty or convention for extradition, can be executed in any State, District or Territory of the United States, and the fugitive brought before the Justice, Judge or Commissioner granting the warrant, at the place where issued or made returnable, by virtue of, and under, Section 5270.

II.—That the treaties of extradition, between the United States and Great Britain, do not make any provision for the execution of warrants, nor do they prescribe the limits of the territorial execution of a warrant to a State or District of the United States, but by Article VI of the treaty of 1889 with Great Britain, extradition of fugitives from the United States must be carried out in the

United States, in conformity with the laws regulating extradition for the time being in force therein.

III.—That the procedure, in extradition proceedings, is governed by the Federal laws, and that laws of the respective states of the United States have no relation to the question, except as necessary to define the crime, and determine whether, upon evidence similar to that introduced on behalf of the demanding government, the accused would have been committed for trial, had the crime been committed in the particular state where he is found.

IV.—That in the case of a fugitive convict, within the treaty, the local law can only be appealed to, to ascertain, whether the crime of which the fugitive has been convicted in the Kingdom of Great Britain and Ireland, is a crime in the particular State or Territory in which the fugitive is found.

TREATIES BETWEEN THE UNITED STATES AND GREAT BRITAIN.

ARTICLE X, OF THE TREATY OF 1842, 8 STAT. AT LARGE, 572, 576.

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other:

Provided, That this shall only be done upon such evidence or criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective Judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining Judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such

fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive."

ARTICLES I, VI AND VII OF THE TREATY OF 1889, 26 STATUTE-AT-LARGE, 1508.

ARTICLE I.

"The provisions of the said Xth Article are hereby made applicable to the following additional crimes:

1. Manslaughter, when voluntary.
2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.
3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.
4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any Company, made criminal by the laws of both countries.
5. Perjury, or subornation of perjury.
6. Rape; abduction; child-stealing; kidnapping.
7. Burglary; house-breaking or shop-breaking.
8. Piracy by the law of nations.
9. Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so, assaults on board a ship, on the high seas, with intent to do grievous bodily harm.

10. Crimes and offenses against the laws of both countries for the suppression of slavery and slave-trading.

Extradition is also to take place for participation in any of the crimes mentioned in this Convention or in the aforesaid Xth Article, provided such participation be punishable by the laws of both countries.

ARTICLE VI.

The extradition of fugitives, under the provisions of this Convention and of the said Xth Article, shall be carried out in Her Majesty's dominions and in the United States, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering State.

ARTICLE VII.

The provisions of the said Xth Article and of this Convention, shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction, and of the sentence of the Court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers."

LAWS OF THE UNITED STATES.

AUGUST 12, 1848, CHAPTER 167, 9 STATUTE-AT-LARGE, 302.

Sec. 1. That in all cases in which there now exists, or hereafter may exist, any treaty or convention for extradition between the government of the United States, and any foreign government, it shall and may be lawful for any of the justices of the Supreme Court or the judges of the several District Courts of the United States—and the judges of the several State courts, and the commissioners authorized so to do by any of the courts of the United States, are hereby severally vested with power, jurisdiction, and authority, upon complaint made under oath or affirmation, charging any person found within the limits of any State, district or territory, with having committed within the jurisdiction of any such foreign government any of the crimes enumerated or provided for by any such treaty or convention,—to issue his warrant for the apprehension of the person so charged, that he may be brought before said judge or commissioner, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge under the provisions of the proper treaty or convention, it shall be his duty to certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of said treaty or

convention; and it shall be the duty of the said judge or commissioner to issue his warrant for the commitment of the person so charged to the proper gaol, there to remain until such surrender shall be made.

Sec. 6. That it shall be lawful for the courts of the United States, or any of them, to authorize any person or persons to act as a commissioner or commissioners, under the provisions of this act; and the doings of such person or persons so authorized, in pursuance of any of the provisions aforesaid, shall be good and available to all intents and purposes whatever.

SECTION 5270 OF THE REVISED STATUTES, OMITTING THE AMENDMENT THERETO BY THE ACT OF JUNE 6, 1900, C. 793, 31 STATUTE-AT-LARGE, 656, WHICH APPLIES ONLY TO THE EXTRADITION OF FUGITIVE CRIMINALS FROM A FOREIGN COUNTRY OR TERRITORY OCCUPIED BY, OR UNDER THE CONTROL OF, THE UNITED STATES.

"Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the per-

son so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

POINTS.

I.

UPON THIS APPEAL, FROM A DECISION UPON THE APPLICATION FOR A WRIT OF *habeas corpus*, THIS COURT HAS THE POWER TO REVIEW THE DECISION BELOW, UPON THE FACTS, AS WELL AS THE LAW.

In re Neagle, 135 U. S., 142.
Horner v. *U. S., 143 U. S., 570.*

An order of a district or circuit court, of the United States, upon an application for a writ of

habeas corpus, can be reviewed only by an appeal, and not by a writ of error.

Rice v. *Ames, 180 U. S., 371.*
Re Morrissey, 137 id., 157, 158.
Re Neagle, supra.

The appeal lies directly to this Court, as the conconstruction of a treaty is drawn, in question.

Rice v. *Ames, supra.*

II.

THE WARRANT OF THE COMMISSIONER IN NEW YORK COULD LEGALLY BE EXECUTED IN INDIANAPOLIS, BY THE MARSHAL FOR THAT DISTRICT, AND THE APPELLEE BROUGHT BY THE MARSHAL, BEFORE THE COMMISSIONER IN NEW YORK FOR A HEARING.

The Act of August 12, 1848, 9 Stat. at Large 302, which was the first law of the United States establishing the procedure, as to the extradition of fugitives from the justices of a foreign country, under a treaty for extradition between the government of the United States and any foreign government, provided that

> "It shall and may be lawful for *any* of the justices of the Supreme Court or the judges of the several District Courts of the United States—and the judges of the several state courts, and the commissioners authorized so

to do by any of the Courts of the United States, are hereby severally vested with power, jurisdiction and authority, upon complaint made under oath or affirmation charging any person found within the limits of any state, district or territory with having committed within the jurisdiction of any such foreign government any of the crimes enumerated or provided for by any such treaty or convention—to issue his warrant for the apprehension of the person so charged that he may be brought before said judge or commissioner, to the end that the evidence of criminality may be heard and considered."

At the time of the passage of the act of 1848, the United States consisted of twenty-nine states. The Mississippi River being practically the western boundary of the states, as all of the most westerly states had their eastern boundaries upon the Mississippi River, with the exception, only, of Texas.

There was then, a vast territory west of the States, without any resident judges of the United States Courts, or State Judges, and United States Commissioners were appointed only in the districts, in states.

United States Commissioners are in general specially appointed, when the occasion requires, as Extradition Commissioners; and a United States Commissioner is not, *ex officio,* an Extradition Commissioner.

By the Act of 1848, there was no limitation as to the exercise of jurisdiction, by any of the judges or commissioners, to the boundaries of

any state or district, but any of them had the power and authority, *upon proper complaint made against any person found within the limits of any state, district or territory,* to issue a warrant for the apprehension of the person charged, that he might be brought before the judge or commissioner for a hearing.

Every judge or commissioner had the same powers. There was no distinction made between judges and commissioners. The commissioner were not given one whit less power or authority, in these proceedings, than the judges named in the statute. A warrant of a commissioner has the same effect and validity as a warrant of any of the judges.

The apprehension of the fugitive, for the purposes of the proceedings instituted on behalf of the foreign country, was to be obtained in any state, district or territory of the United States, so as to bring him before the judge or commissioner who had issued the warrant.

It was in furtherance of the objects of extradition treaties with foreign governments and to assist their representatives in carrying them into effect, that the complaint might be made before any of the judges or commissioners, and, upon the warrant being obtained, the fugitive could be apprehended wherever he might be found within the United States.

The decision of the Court below would have this statute limited, so that the warrant must be obtained within the state or district where the fugitive might be found.

There is nothing in the statute which warrants any such construction.

As to fugitive offenders against the laws of the United States, there is, in the statutes, a limitation as to the power of magistrates to the state "where he may be found."

If it had been the intention of Congress to make any such limitation in extradition proceedings, it would have been expressed.

These proceedings are, in general, instituted by a consul of the foreign country desiring the extradition of the fugitive. The jurisdiction of a consul extends over more than one state; there are consular districts, extending over as many as 14 different states and territories.

The complaints in these proceedings, are, in general, made before the district judge or commissioner at the place of the official residence of the consul.

Instructions as to the commencement of extradition proceedings, on behalf of Great Britain, are not all sent to one particular consul, at a particular place, but to the consul within whose consular jurisdiction the fugitive will arrive, will supposedly be found, or from which he may most easily be traced. A warrant obtained by a consul, under these circumstances, before the judge or commissioner most convenient to him, executed beyond the consular jurisdiction of the consul making the complaint, has no feature about it which tends to justify a criticism of want of fairness or disadvantage to the fugitive.

A judge or commissioner is not always at hand

in all localities of the states of the United States where a fugitive might be found, and if, after locating him, the representative had then to obtain the warrant, the ends of justice might be thwarted.

If a foreign government has first to find and locate the fugitive, in a particular district, in the United States, before a warrant is obtained for his arrest, justice may often be defeated. A fugitive may be known to be in New York, and a warrant there obtained. While the warrant is being applied for, he moves over into New Jersey. According to the decision of the Court below, a new warrant must be obtained in New Jersey. Before that warrant could be executed, the fugitive might go into the State of Pennsylvania, where a new warrant would have to be obtained, if the Court below is correct.

It is not to be overlooked that the person starts with the status of a fugitive from justice, and presumably will continue his flight until apprehended. If a foreign government should be required to obtain a warrant in every state in which the fugitive is supposed to be, it would entail upon the government such difficulties and annoyances as were never contemplated by the law or treaty.

When it was contended that in these cases, a mandate should be obtained, before proceedings for extradition could be instituted, this Court, in holding that a mandate was not necessary, said, in *Grin* v. *Shine, 187 U. S., 194:*

> "Bearing in mind the frequent necessity for immediate action in case the whereabouts of the accused is ascertained, the delay necessary

to procure a preliminary requisition, might often result in the defeat of justice."

Sec. 5270 of the Revised Statutes is substantially the same as the Act of 1848. The only noticeable difference is that "Circuit Judges" are added, and "a judge of a court of record of general jurisdiction of any State" was substituted for "the judges of the several State courts."

It had been held, before the Act of 1848, that, under the treaty of 1842, a justice of the peace was a competent magistrate.

The British Prisoners, 1 Wood & M., 66.

The first reported case, upon the right of execution of warrants in extradition proceedings, beyond the district, in which issued, seems to be *In re Philip Henrich, 5 Blatch., 415,* decided in 1867.

That was a proceeding under the treaty with Prussia.

The late Justice, Samuel Nelson, then of this Court, upon a proper complaint, had issued his warrant, directed to the marshals of the United States in any district, or to any of their deputies, commanding them and each of them to arrest Henrich, forthwith, and bring him before said Justice or Commissioner White at the City of New York, or some other Magistrate in New York, that the evidence of criminality might be heard and considered.

The warrant was placed in the hands of the Marshal of the United States for the Southern District of New York, who, by one of his deputies,

apprehended Henrich, in Wisconsin, and brought him before Commissioner White in New York.

It was claimed for Henrich that his arrest was illegal, and, after having been committed for extradition by Commissioner White, a writ of *habeas corpus* was obtained, and argument thereon had before District Judge Shipman, who disposes of the question of the arrest, as follows:

> "The first two objections to the action of the Commissioner, raised by the prisoner's counsel, rest upon the fact that he was arrested in Wisconsin, by a special deputy of the Marshal of the Southern District of New York. It is insisted that this deputy had no legal authority to execute the warrant of Mr. Justice Nelson, out of the limits of this District, and the 27th Section of the Judiciary Act of September 24th, 1789 (1 U. S. Statutes-at-Large, 87), is referred to as conclusive on this point. This section gives the Marshal no authority to execute precepts beyond the limits of his District, and it is, therefore, argued, that the deputy in this case could not lawfully execute this warrant in another District. The warrant in question was issued by Mr. Justice Nelson, and addressed to the Marshals of the United States for any District respectively, and to their deputies or the deputies of any of them, or to any of said deputies. The precept is to each and every of them, in the name of the President of the United States, to apprehend the said Philip Henrich, and forthwith bring him before the said Justice, or before the Commissioner named, or some other magistrate, at New York, &c. The operation of the warrant is not limited in terms to any

judicial District. The fugitive was not to be apprehended for any crime committed against the United States, for which he was amenable to trial in any particular District. His extradition was not sought from any District as such, but from the United States. He was to be arrested in order that he might be delivered, on good cause being shown, to the agents of the government from which he had fled. The section of the Judiciary Act referred to has no application to an arrest under an extradition treaty. No such treaty was in existence when the Act was passed, and no proceedings under such a treaty could have been contemplated by its framers. Indeed, an application of the implied restrictions of that act relating to Marshals, to warrants for the arrest of fugitives from foreign States, would make the execution of these treaties depend wholly upon the Magistrates of the District in which such fugitives might be arrested. Under such a construction, the hearing and delivery must be in the District where the arrest is made, as no Judge or Marshal could remove him to another District.

The 33rd Section of the Judiciary Act, authorizing and regulating the removal of parties arrested in one District, to be held for trial in another, clearly has no application to such a case as the present. It is claimed that the Marshal of Wisconsin should have arrested Henrich under this warrant. But he could not have performed the duty required by the warrant, under the construction of the law urged; for, if his powers under it are to be confined to his own District, then he could not have executed that part of the precept which required him to bring the accused before Mr. Justice Nelson or Commissioner

> White, at New York. Considering the object of the treaty, the provisions of the statute for carrying it into effect, by authorizing the arrest of the fugitive in any State or Territory of the United States, and the scope of Mr. Justice Nelson's warrant, I am satisfied that the arrest was legal, and that the Commissioner had jurisdiction."

In this opinion of Judge Shipman, it appears that it was rendered after a consultation with Mr. Justice Nelson, then a Justice of this Court, and the presiding Judge of the Circuit Court, in the Second Circuit, and Justice Blatchford, afterwards a Justice of this Court, whose decisions, in respect to the law of extradition, have always had great weight.

The next case reported upon this question is *Re Fergus*, 30 Fed. Rep., 607.

Fergus was arrested in State of New York by the Marshal for the District of Massachusetts, upon the District Judge's warrant, issued at Boston, and brought into the State of Massachusetts, when, there being a defect found in the warrant under which he was apprehended, a second complaint was made, and a second warrant obtained, under which he was re-arrested. No order was made upon the first complaint and warrant. The fugitive claimed that his arrest in the State of New York, under the first warrant, was illegal; that he was illegally brought within the jurisdiction of the District of Massachusetts, and that therefore the execution of the second warrant was improper; he instituted *habeas corpus* proceedings, return-

able before the Circuit Court. The opinion of the Circuit Judge is as follows:

COLT, *J.*:

> "I find no sufficient ground on which to grant this petition. The first warrant directed the marshal or his deputies to arrest the petitioner if found within their district. He was arrested by a deputy marshal on this warrant in New York State. The evidence is that, after his arrest in New York, the petitioner came voluntarily into Massachusetts. Under the form of the first warrant, there being a question whether the petitioner could be held upon it, a second warrant, was issued by the district judge upon a second complaint, and no order was made upon the first complaint and warrant. It is contended that the court had no power to issue a second warrant under the circumstances. We are here dealing with a case arising under the extradition law; and it has been held that a warrant may run throughout the United States and may be executed by any marshal or deputy marshal in any district. The fugitive is not apprehended for any crime committed against the United States, for which he is amenable to trial in any particular district. His extradition is not sought from any district as such, but from the United States. *In re* Heinrich, 5 Blatchf., 414, Spear, Extr., 254 Upon the state of facts presented in this petition, I think the court had power, under Section 5270 of Revised Statutes, to issue a second warrant."

In *Ex parte Van Hoven, 4 Dillion, 415*, the fugitive was arrested in Minnesota by a deputy marshal from the Southern District of New York, upon a warrant, issued by a commissioner in the Southern District of New York. A writ of *habeas corpus* was obtained and dismissed, and the Court directed that the accused be conveyed before the Commissioner in the Southern District of New York, who was to decide whether, according to the law and the evidence, the extradition was due, pursuant to the treaty.

The question as to the legality of the arrest, does not appear to have been raised by counsel for the fugitive, but considering the other questions submitted to the Court, if there had been any doubt about the right to arrest in Minnesota, the objection would have been made.

The cases cited, and others unreported, are referred to in Section 304 of Moore on Extradition, in support of the statement that warrants in extradition proceedings may run throughout the United States.

The State Department, in issuing mandates, where required under treaties of extradition, does not issue them to a judge or commissioner, in any particular state or district, but directs them to any justice of the Supreme Court, Circuit Judge, District Judge, &c., &c., as contained in Section 5270 of the Revised Statutes.

See various forms, in Moore on Extradition, pp. 362, 364, 365.

The mandates recite, that application has been

made by the representative of the demanding government, for the arrest of the fugitive for an extraditable crime, and that the person whose arrest is sought is a fugitive from the justice of a foreign government, *and is now within or believed to be within the jurisdiction of the United States*, and it appears proper that the said fugitive should be apprehended and the case examined in the mode provided by the Acts of Congress.

In the year 1882, an effort was made to have Sec. 5270 amended, as a result of the extradition of one Esposito, who had been arrested in New Orleans by a private detective, upon a warrant issued by a commissioner, in the Southern District of New York, and brought before the Commissioner in New York. The warrant ran

> "to any Marshal of the United States, to the Deputies of any such Marshal, or any or either of them, to any sheriff, constable or other officer, in any State, District or Territory, within the jurisdiction of the United States; to James Mooney."

Mooney was the detective who made the arrest. The defense to the proceedings was an *alibi*, and that the prisoner was not the person sought for.

Upon the hearing before the Commissioner, it was claimed that the arrest was illegal; this was overruled.

After the extradition of Esposito, his counsel called the attention of Congress to the proceedings, and notably the hardship and injustice that

could be done, in bringing a fugitive from the place where he was found, to a distant state for hearing. The matter was referred to the Committee on the Judiciary of the Senate, and a report was made January 24, 1882 (Sen. Report, No. 82, 47th Congress, 1st Session), which resulted in the passage of the Act of August 3, 1882, Chap. 378, 22 Stat. at L. 215. Section 5270 was not amended in any particular, as a result of the investigation, but as to the arrest, in these proceedings, the report reads:

> "The committee are not aware of any mode by which the difficulties set forth in the communication referred to, attending the bringing of persons accused before a jurisdiction far away from their place of residence, can be reached. The extradition exists with the United States as a whole, regardless of locality, and not with the States or in references to any section or district. The only question is, is there a sufficient complaint against a person anywhere within the United States Then the arrest is made for the purpose of an ultimate trial for the offense alleged to have been committed, regardless of the whereabouts or the mere convenience of place, of the party accused. To change the law in this regard would be to give the person sought for all the advantage against the Government with which the United States has the contract of extradition."

The right to arrest the appellant in Indiana is not only supported by the decisions cited, but the action of Congress in not amending the law, as asked for in respect to arrests, indicates that the

right to arrest under these warrants, anywhere in the United States, under Section 5270, was recognized by the lawmakers.

III.

THE FEDERAL LAW REGULATES PROCEEDINGS FOR EXTRADITION, AND STATE LAWS HAVE NO APPLICATION THERETO, EXCEPT AS NECESSARY TO DEFINE THE CRIME, AND DETERMINE WHETHER THE EVIDENCE INTRODUCED IN SUPPORT OF EXTRADITION, WOULD BE SUFFICIENT TO JUSTIFY HIS COMMITMENT FOR TRIAL, IF THE OFFENSE HAD BEEN COMMITTED WITHIN THE STATE IN WHICH HE IS FOUND.

The provisions in Article X of the treaty of 1842, that the surrender shall be "done only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had been there committed," is the only provision upon which state law can have any bearing.

Rice v. *Ames, 180 U. S., 371.*

In the last-cited case it was contended that the proceedings before the commissioner were governed by the law of the state of Illinois. The commissioner had adjourned the proceedings for a

period of eleven days. The laws of Illinois allowed magistrates to continue a case for a period of not exceeding ten days, and it was insisted that the commissioner, by reason of an adjournment beyond the time allowed by the state law, had lost jurisdiction of the case, as the laws of Illinois were controlling upon the proceedings before the commissioner. The Court, in respect to this contention, said:

> "By the second assignment, petitioners insist that the commissioner lost jurisdiction in the premises by continuing the proceedings from June 14 to June 25, a period of eleven days, in supposed violation of §67, article 7, of chapter 79 of the Revised Statutes of Illinois, governing continuances by justices of the peace and examining magistrates, which enacts that 'the justice before the commencement of the trial may continue the case *not exceeding ten days* at any on time on consent of the parties or on any good cause shown.' It is insisted that this statute controls proceedings before commissioners of the United States in extradition cases, by virtue of the treaty and of the several acts of Congress prescribing the duties of commissioners. The treaty only provides in Art. 6 (26 Stat. at L. 1508, 1510), that 'the extradition of fugitives under the provisions of this convention and of the said 10th article' (of the treaty of August 9, 1842) 'shall be carried out in the United States and in her Majesty's dominions respectively, in conformity with the laws regulating extradition, for the time being in force in the surrendering States.' This evidently contemplates the laws of the United States regulating extradition, and has no reference

whatever to the laws of the particular State within which the proceedings are taken.

"Provision is made by Rev. Stat., §627, for the appointment of commissioners of the Circuit Court (now called United States commissioners' act, May 28, 1896, §19, 29, Stat. at L. 140, chap. 252), who shall exercise such powers as may be conferred upon them. By Rev. Stat. §727, they are vested with such authority 'to hold to security of the peace and for good behavior in cases arising under the constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States in cases cognizable before them.' This evidently defines the extent of their powers, and not the mode in which such powers are to be exercised. By §1014 they are vested with the power to arrest, imprison, or bail offenders 'for any crime or offense against the United States' 'agreeably to the usual mode of process against offenders in such State,' that is, the State wherein the offender 'may be found.' That this has no application to continuances before commissioners in extradition proceedings is evident, first, by the fact that the section is confined to crimes or offenses against the United States, and, secondly, because it refers only to the usual mode of *process* against offenders in such State, and not to the incidents of the examination. To hold that the commissioner is confined in the matter of continuances to the methods prescribed for justices of the peace and other magistrates of the particular State would be utterly destructive of his power in cases arising beyond the seas, where weeks might be required to obtain the attendance of witnesses or the procure-

> ment of properly-authenticated depositions for use upon the examination. Clearly there is nothing either in the treaty or in the statutes requiring commissioners to conform to the State practice in that regard. The only requirement seems to be that arising from the 10th section of the Ashburton Treaty, that the fugitive shall only be surrendered 'upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed.' "

In *Wright* v. *Henkel, 190 U. S., 40,* cited by the court below, there is no foundation for a claim that a hearing in these proceedings should be had in the State where the fugitive might be found. There was no such question in that case. What was determined was, that, as in the State of New York, where the fugitive was found, the offense charged was a crime, as it was also in the country from which the accused fled, the requirements of the treaty "made criminal by the laws of both countries" were fulfilled in respect of the particular offense charged; and the penal code of New York was referred to only to ascertain whether the offense charged was a crime in New York.

IV.

IN THE CASE OF A FUGITIVE CONVICT, SUCH AS THE APPELLEE, THE STATE LAW HAD NO APPLICATION, OTHER THAN TO ASCERTAIN WHETHER THE CRIME OF WHICH THE APPELLEE HAS BEEN CONVICTED WAS A CRIME WITHIN THE LAWS OF INDIANA, AND THIS COULD BE DETERMINED WITH EQUAL PROTECTION TO ALL RIGHTS OF THE APPELLEE, AS WELL IN NEW YORK AS IN INDIANA.

The appellee is not a fugitive who is charged with crime simply; he is a person who is proceeded against as one who has been convicted of the crime; the procedure therefore in his case is not regulated by the 10th article of the treaty of 1842, in so far as evidence of his criminality is concerned, that has already been established by his conviction. But by Article VII of the treaty of 1889, which, dealing specially, with persons convicted of the crimes respectively named and specified in the said Article X, whose sentence therefor shall not have been executed, prescribes the evidence upon which a fugitive shall be surrendered; that is, a record of the conviction, and of the sentence of the court before which such conviction took place, duly authenticated, together with evidence of identity. State laws have no application, for the treaty by its terms has created the character and kind of

evidence required to obtain a surrender of convicts. The provisions of the 10th article of the treaty of 1842, as to evidence of criminality, are not inconsistent with Article VII of the treaty of 1889, as it was clearly the purpose of the High Contracting parties to modify and alter the requirements of evidence as to fugitive convicts. It was never intended to require that the demanding government, under this treaty, in the case of a fugitive convict, should, before his surrender, introduce such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offense had been there committed, and so go through the form and requirements of a preliminary proceeding for commitment for trial, when, presumably, that had all been done in the courts in the jurisdiction of the demanding government. While it cannot be said that a fugitive, convicted of crime, is not one charged with crime, there is a distinction made in these treaties between the person charged, simply, and one who has been convicted. The conviction is conclusive evidence of criminality, and intended by the treaty to be made so, and no further evidence of criminality was to be required or needed, as the criminality is established by a duly authenticated copy of the record of conviction, and the sentence of the court before which the conviction took place. The only other evidence that was required was that of the identity of the fugitive as the person referred to in the conviction. Local or State laws, as to evi-

dence, have no application, therefore, in the cases of fugitive convicts. Whatever might be said in support of the decision of the Circuit Court, in respect to a person who had not been convicted of crime, and who was entitled to a hearing, and to have the evidence of criminality determined by the law of the place where he was found, can have no force in the case of a fugitive convict, under the treaty; for the treaty of 1889 has, in respect to fugitive convicts, avoided the requirements of evidence of criminality contained in the treaty of 1842.

If there is any conflict or inconsistency between Article X of the treaty of 1842, and Article VII of the treaty of 1889, the latter will control; being, in effect, a later law, it supersedes the earlier treaty.

Head Money cases, 112 U. S., 580.
Whitney v. *Robertson, 124 id., 190.*
Horner v. *United States, 143 id., 570.*
Chinese Exclusion cases, 130 id., 581.

Treaties for extradition are to be liberally construed, for the purpose of carrying their object into effect.

Grin v. *Shine, 187 U. S. R., 191.*
Tucker v. *Alexandroff, 183 U. S., 424.*

An alien convict has no right of asylum or habitation anywhere in the United States under our immigration laws, and can acquire no local residence.

Grin v. *Shin, supra.*

V.

IT IS RESPECTFULLY SUBMITTED THAT THE ORDER APPEALED FROM SHOULD BE REVERSED.

CHARLES FOX,
Of Counsel for H. B. M. Consul-
General, at New York,
Appellant.

Supreme Court of the United States

OCTOBER TERM, 1893

No. 163

HENRY C. PETIT, UNITED STATES MARSHAL FOR THE DISTRICT OF INDIANA, *Appellant*,

vs.

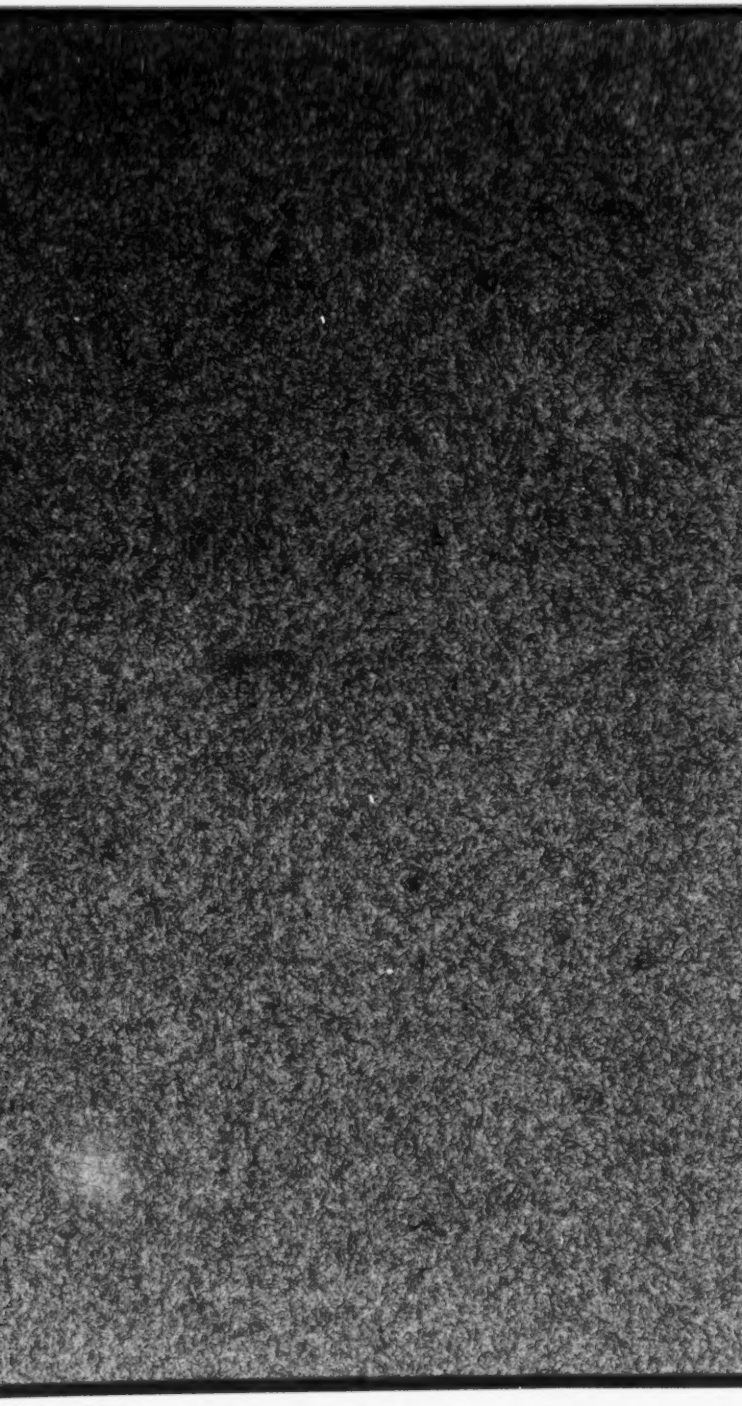
THOMAS WALKER,

APPEAL FROM THE CIRCUIT COURT OF THE DISTRICT OF INDIANA.

ANSWER TO ASSIGNMENT OF ERROR.

ADDISON C. HARRIS,
FERDINAND WINTER,
Attorneys for Appellee.

The Bobbs-Merrill Printing Co., Indianapolis.



IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1903.

No. 563.

HENRY C. PETTIT, UNITED STATES MARSHAL FOR THE DISTRICT OF INDIANA, *Appellant*,

vs.

THOMAS WALSHE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

Comes now the appellee and makes answer to the appellant's assignment of errors herein and says:

First. There is no error in the record.

Second. Appellee pleads that immediately upon the

rendition of the opinion and entering of judgment in said cause discharging this appellee, as appears from the transcript of the record, the appellant did not except to the ruling and judgment of the court below, from which this appeal is prosecuted, but on the contrary, as appears from the transcript of the proceedings before Hon. Charles W. Moores, United States Commissioner for the district of Indiana in the matter of the extradition proceedings against James Lynchehaum, of which a certified transcript is filed herewith and hereto attached, marked Exhibit A., the complainant, at whose instance and in whose behalf the appellee was under the arrest from which he was discharged by the said ruling and judgment, immediately thereupon, in accordance with the said ruling and judgment, applied to Hon. Francis E. Baker, the judge of the Circuit Court of the United States for the district of Indiana, by whom said ruling and judgment was made, for a warrant for the arrest of appellee by the name of James Lynchehaun, upon which warrant appellee was arrested by the appellant and brought before said Hon. Charles W. Moores, before whom said matter was heard, and by whose judgment rendered therein on the merits, appellee was discharged, and which judgment of discharge is in full force.

Third. Appellee further pleads that immediately upon the making of the ruling and decision from which the appeal in this case is prosecuted, C. Clyde Bayley, his Britannic Majesty's acting consul at the port of New York, presented his complaint to Hon. Francis E. Baker, judge of the Circuit Court of the United States for the district of Indiana, in which it was alleged that the appellee by the name of James Lynchehaun had been convicted in the kingdom of Great Britain and Ireland, of the crime of assault and battery with the intent to com-

mit murder, and sentenced to penal servitude for life; and that he had escaped pending the execution of said sentence, and thereupon demanded the extradition of appellee, upon which complaint, said judge issued his warrant to the appellant in this cause commanding him to arrest appellee and bring him before Hon. Charles W. Moores, United States commissioner for the district of Indiana, specially authorized to act in matters of extradition, in order that the matters in said complaint alleged, might be heard, and extradition of appellee adjudged if said matters should be established. Upon which warrant, appellee was arrested by the appellant and brought before said Moores, commissioner, by whom the said matter was heard and by whose judgment thereafter on the 31st day of October, 1903, the appellee was discharged, which hearing and judgment were on the merits of said matter, all of which appears by a transcript of the proceedings and judgment in said matter duly certified by said commissioner, which is filed herewith and made a part hereof, as Exhibit A. Said judgment of discharge is in full force.

The appellee further avers and shows that he and the said James Lynchehaun, described in said proceedings, are one and the same person, and that the matters and things heard and determined by said commissioner are the same matters and things for which appellee was arrested and was under imprisonment, from which he was discharged by the ruling and judgment from which the appeal in this case is prosecuted, and not other or different.

ADDISON C. HARRIS,
FERDINAND WINTER,
Attorneys for Appellant.

EXHIBIT "A."

IN THE MATTER OF THE EXTRADITION PROCEEDINGS AGAINST JAMES LYNCHEHAUN.

It appearing that on the 11th day of September, 1903, a complaint had been duly filed in the office of the Hon. Noble C. Butler, clerk of the United States Circuit Court for the district of Indiana, the same being sworn to before the Hon. Francis E. Baker, judge of the said court, which complaint was subscribed and sworn to by C. Clyde Bayley, his Britannic Majesty's Acting Consul General at the port of New York, before Thomas Alexander, United States Commissioner for the southern district of New York, a commissioner duly authorized by the District Court of the United States for the southern district of New York to act as commissioner under the laws of the United States concerning the extradition of fugitives from the justice of a foreign government under the treaty and conventions between this and any other foreign government, which complaint charged in substance, that on or about the 15th day of July, in the year 1895, at the General Assizes and General Gaol Delivery, held at Castlebar, in the county of Mayo, before Mr. Justice Gibson, one James Lynchehaun was convicted of having, on October 6, 1894, unlawfully wounded one Agnes McDonnell with intent thereby and then feloniously and of his malice aforethought, her the said Agnes McDonnell, to kill and murder, and was sentenced to be kept in penal servitude for life, and was thereafter under and by virtue of said judgment and sentence, committed to the Maryborough convict prison in Queens county, Ireland, and that on the 6th day of September, 1902, before said sentence had been executed, did escape and is now at large, and the said sentence has never

been executed, and that the said Lynchehaun is a fugitive from the justice of the king of Great Britain and Ireland and is now within the territory of the United States, and that the crime for which he was so as aforesaid convicted and sentenced, is named in the treaty between the United States and Great Britain, and that the said affiant makes such affidavit upon information and belief based upon a certified copy of the certificate of conviction of the said Lynchehaun, the deposition of one Thayne, and the warrant for the apprehension of the said person as an escaped convict; which complaint is in the words and figures following, to wit:

IN THE MATTER OF THE APPLICATION FOR THE EXTRADITION OF JAMES LYNCHEHAUN, UNDER THE TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN.	COMPLAINT.

UNITED STATES OF AMERICA,

Southern district of New York, ss:

C. CLYDE BAYLEY, his Britannic Majesty's acting consul general at the port of New York, being duly sworn, doth depose and say upon information and belief:

First. That heretofore and on or about the 15th day of July, in the year 1895, at the General Assizes and General Gaol Delivery, a court of competent jurisdiction, for the county of Mayo, in that part of the United Kingdom of Great Britain and Ireland called Ireland, and within the jurisdiction of his said Britannic Majesty, held at Castlebar in said county, before the Right Hon. Mr. Justice Gibson, a justice of said court, one James Lynchehaun, was convicted of having on the 6th day of October, 1894, feloniously and unlawfully wounded one Ag-

nes McDonnell with intent thereby, then feloniously and of his malice aforethought, her, the said Agnes McDonnell, to kill and murder, and was by the said court, sentenced to be kept in penal servitude for the term of his natural life, and was thereafter under and by virtue of said judgment and sentence of said court, committed to the Maryborough convict prison, in Queens county, in Ireland, and that on or about the 6th day of September, in the year 1902, before the said sentence had been executed, the said James Lynchehaun did escape from the said Maryborough convict prison and is now at large, and the said sentence of the said James Lynchehaun has never been executed.

Second. That the said James Lynchehaun is a fugitive from the justice of the kingdom of Great Britain and Ireland and is now within the territory of the United States of America.

Third. That the said crime for which the said James Lynchehaun was so as aforesaid convicted and sentenced, is named and specified in the treaty between the United States and Great Britain.

Fourth. That deponent's information and belief are based upon a certified copy of the certificate of conviction of said James Lynchehaun, at the said court of Assizes, and the deposition of James William Thayne, and a warrant for the apprehension of the said James Lynchehaun as an escaped convict or criminal, all certified as required by the act of Congress, of August 3, 1882.

C. CLYDE BAYLEY.

Subscribed and sworn to before me this 4th day of September, 1903.

(SEAL.) THOMAS ALEXANDER,

United States Commissioner for the southern district of New York, and commissioner duly authorized by

the district court of the United States for the southern district of New York, to act as commissioner under the laws of the United States concerning the extradition of fugitives from the justice of a foreign government, under a treaty or convention between this and any foreign government.

And it appearing that a warrant has been issued on said 11th day of September, A. D. 1903, by the Hon. Francis E. Baker, judge of the United States Circuit Court for the district of Indiana, for the apprehension of the said Lynchehaun in accordance with the terms of the treaty between the United States and Great Britain touching the extradition of fugitives from justice and conventions supplemental thereto, which warrant is in the words and figures following, to wit:

The President of the United States to the Marshal of the United States within and for the district of Indiana, or any of his lawful deputies, greeting:

WHEREAS, Complaint has been made on oath under the treaty between the United States of America and her late Majesty, the Queen of Great Britain and Ireland, concluded and signed at Washington on the 9th day of August, 1842, and of the supplementary treaty between the same high contracting parties, signed July 12, 1889, before the undersigned, a judge of the Circuit Court of the United States for the district of Indiana:

That heretofore, on or about the 15th day of July, in the year 1895, at the General Assizes and General Gaol Delivery for the county of Mayo, in that part of the United Kingdom of Great Britain and Ireland, called Ireland and within the jurisdiction of his said Britannic Majesty, held at Castlebar, in said county, before the Right Hon. Mr. Justice Gibson, a justice of said court,

one James Lynchehaun was convicted of having on the 6th day of October, 1894, feloniously and unlawfully wounded one Agnes McDonnell, with intent thereby and then feloniously, and of his malice aforethought, her, the said Agnes McDonnell, to kill and murder, and was by the said court, sentenced to be kept in penal servitude for his natural life, and was thereafter under and by virtue of said judgment and sentence of said court committed to the Maryborough convict prison, in Queens county, in Ireland, and that on or about the 6th day of September, in the year 1902, before the said sentence had been executed, he, the said James Lynchehaun, did escape from the said Maryborough convict prison and is now at large, and the sentence of the said James Lynchehaun aforesaid has never been executed; and that the said James Lynchehaun is a fugitive from the justice of the kingdom of Great Britain and Ireland, and is now within the territory of the United States of America and is believed to be within the said district of Indiana; and that the said crime for which the said James Lynchehaun was so, as aforesaid, convicted and sentenced, is named and specified in the treaty between the United States and Great Britain.

NOW, THEREFORE, WE COMMAND YOU FORTHWITH, That you take the said James Lynchehaun and bring him before the undersigned or Charles W. Moores, a United States commissioner and commissioner specially appointed to act in extradition cases in the city of Indianapolis, in the district of Indiana, to the end that evidence of the criminality of the said James Lynchehaun may be heard and considered, and if deemed sufficient to sustain the charge, that the same may be certified, together with a copy of all the proceedings, to the secretary of state of the United States of America, that a

warrant may issue for his surrender pursuant to the said treaty.

WITNESS my hand and official seal this 11th day of September, A. D. 1903.

FRANCIS E. BAKER,
United States Circuit Judge,
7th Circuit.

On the said September 11, 1903, the said James Lynchehaun was brought before me, Charles W. Moores, United States Commissioner within and for the district of Indiana, duly authorized and empowered by the district court of the United States for the said district of Indiana, to act as commissioner under the laws of the United States concerning the extradition of fugitives from the justice of foreign governments, and particularly to discharge and perform all the duties required by the provisions of Section 5270 of the Revised Statutes of the United States, and to that end to execute the act of Congress entitled, "An Act for giving effect to certain treaty stipulations between this and foreign kingdoms for the apprehension and delivery of certain offenders," approved August 12, 1848, and of the several acts of Congress amendatory thereof, my authority thereunto being derived from the order of said court dated the 28th day of April, 1903. And thereupon in the presence of the said defendant, James Lynchehaun, and of his counsel, the said complaint was then and there fully read and explained to him, and he thereupon for his plea said that he was not guilty as charged in the said complaint.

And thereupon, in the preliminary trial to determine the identification of the person aforesaid and his probably criminality as required under such treaties and stat-

utes, and for the further purpose of the said hearing and examination, the counsel for the complainant, the British government, and for the defendant, James Lynchehaun, moved the court for a continuance of the further hearing of this cause until the 16th day of September, 1903, and the said motion being agreeable to both parties, said continuance was granted.

And thereupon, upon the same day I issued a temporary mittimus committing the defendant to the jail of Marion county, Indiana, pending examination, which temporary mittimus is in the words and figures following, to wit:

TEMPORARY MITTIMUS.

United States of America,
District of Indiana,
City of Indianapolis.

The President of the United States to the keeper of the jail in Marion county, state of Indiana, greeting:

WHEREAS, James Lynchehaun has been arrested upon the oath of C. Clyde Bayley, acting consul general for his Britannic Majesty, at the port of New York, charged with the following offenses, that is to say: That on or about the 15th day of July, 1895, at the General Assizes and General Gaol Delivery for the county of Mayo, in Ireland, held at Castlebar, the said defendant was convicted of having on the 6th day of October, 1894, feloniously and unlawfully wounded one Agnes McDonnell, with intent thereby and then feloniously and of his malice aforethought, her, the said Agnes McDonnell, to kill and murder, and was by the said court sentenced to

penal servitude for his natural life, and pursuant to such sentence was committed to the Maryborough convict prison in Queens county, in Ireland; and that on September 6, 1902, before such sentence had been executed, the said James Lynchehaun, not having been theretofore lawfully pardoned, did escape from said prison, and that said sentence has never been executed, and proceedings have been instituted under the provisions of Section 5270 of the Revised Statutes of the United States for the extradition of offenders, and said proceedings are in process of hearing before me, Charles W. Moores, United States Commissioner for said district of Indiana by the district court of said district of the United States duly authorized and empowered to conduct such proceedings, and the offense for which the said James Lynchehaun is being held is one for which no bail can be taken.

THESE ARE, THEREFORE, TO COMMAND YOU, In the name and by the authority aforesaid to receive said James Lynchehaun, prisoner of the United States of America, in the jail of said Marion county, in the state of Indiana, there to remain until recalled by my warrant for the purpose of further investigation as to the matters and things hereinbefore set forth, and until he be discharged by due course of law.

Given under my hand and seal in the city of Indianapolis, district of Indiana, this 11th day of September, A. D. 1903.

CHARLES W. MOORES,

United States Commissioner for the district of Indiana, and commissioner duly authorized by the district court of the United States for said district to act as commissioner under the United States concerning the extradition of fugitives from the justice of a foreign government under a treaty or convention between this and any foreign government.

On September 16, 1903, pursuant to the continuance of September 11, 1903, last above noted, the defendant, James Lynchehaun was brought before me, the said commissioner, in the United States Circuit Court by Henry C. Pettit, United States marshal, the defendant being present in person and by counsel anl the complainant by Charles Fox and Jesse J. M. LaFollette, its counsel. Thereupon the defendant, by leave of the court, withdrew the plea of not guilty heretofore entered in this cause and filed his motion to dismiss the proceedings on the ground that the commissioner had no jurisdiction to hear the same, and that the Hon. Francis E. Baker, judge of the United States Circuit Court for the district of Indiana, having issued the warrant, was the only court authorized to hear the case.

This motion the commissioner overruled. Thereupon the defendant, on leave of court, re-entered his plea of not guilty.

It was thereupon stipulated by counsel that certain documents taken at a former hearing similar in character to the present hearing looking to the extradition of the said James Lynchehaun, which former hearing was instituted on the 24th day of August, 1903, and dismissed on motion of the complainant on September 8, 1903, that is to say: The testimony of E. J. Weiss and —— given upon said hearing was to be accepted in this hearing in lieu of the verbal testimony of the said witnesses.

Thereupon the defendant offered in evidence the following documents, to wit:

The warrant issued by Jas. Woulfe Flanagan on December 16, 1902, for the apprehension of James Lynchehaun.

2. Deposition of Jas. Wm. Thayne, dated December 16, 1902.

3. Certificate of conviction dated December 16, 1902, executed by B. Whitney, clerk of the Crown and Peace for the county of Mayo.

4. Authenticating certificate of C. E. Troup, assistant under secretary of state, dated May 22, 1903, and authenticating certificate of Joseph H. Choate, United States Ambassador.

All attached and marked Exhibit A., W. N. Carpenter, stenographer.

Also document certified by B. Whitney and Henry Sheridan to be a copy of the record, trial and conviction of James Lynchehaun under date of September 2, 1903, to which are attached the authenticating certificates of Henry Cunyngham, assistant under secretary of state, on September 4, 1903, and also authenticating certificate of Joseph H. Choate, United States Ambassador.

To the admission of the documents last described, the defendant objected on the grounds:

1. That the certificates are authenticated "to the best of the authenticating officers' knowledge and belief."

2. That the warrant of the Irish magistrate did not show jurisdiction.

3. That the document purporting to be a copy of the record and sentence of the said James Lynchehaun was entitled "The certificate of the record of conviction" in the certificate of authentication.

The ruling upon these objections was suspended and the matter taken under advisement by the commissioner.

Thereupon the following witnesses were sworn and examined on the part of the complainant, that is to say: Richard Hicks and William Tynden. Upon the request

of the defendant, assented to by the complainant, this hearing was thereupon adjourned.

Upon September 21, 1903, complainant being represented by Jesse J. M. LaFollette and the defendant by Ferd Winter and Henry N. Spaan, the hearing was resumed and the commissioner announced that the objections of the defendant to the documents offered in evidence heretofore described were overruled and the documents were thereupon admitted in evidence and the hearing was adjourned until September 24, 1903, at 10 o'clock A. M.

On September 24, 1903, pursuant to the continuance of September 21, 1903, the defendant was brought before me, said Commissioner, at my said office, in said district, by H. C. Pettit, marshal, and the defendant being present, the following witnesses were sworn and examined on the part of the demanding government: Sergt. Richard Hicks, William Tynden, and their evidence being heard and concluded, request was made on the part of both the demanding government and the defense that this cause be continued until September 25, 1903, and on said 25th day of September, 1903, the following witnesses were sworn and examined on the part of the defendant; that is to say, the defendant himself, James Lynchehaun; and thereupon, evidence being heard, on the joint request and consent of both parties, the further hearing of this cause was continued until the 5th day of October, 1903, at which time the following witnesses on behalf of the defendant were sworn and examined, that is to say: Daniel Conway, Cleveland; Patrick Veasey, Cleveland; —— McNamara, and James Corrigan, Cleveland; Thomas J. Lynch, J. P. O'Mahoney, and Maurice Donnelly, of Indianapolis. Said evidence being heard and documentary evidence be-

ing submitted, this hearing was continued until the 6th day of October, on which day the further testimony of the said witnesses was heard. Thereupon, upon request of counsel for the demanding government, and for the defense, the further hearing of this cause was continued until the 12th day of October, 1903.

On October 12, 1903, the defendant being present in court, as upon each day heretofore named, argument was had by Charles Fox, Esq., of New York, for the British Government, and Henry N. Spaan and Addison C. Harris, for the defense, and J. J. M. LaFollette, for the British Government.

Said argument continued through the days of October 12, 13 and 14, and the argument being concluded on the day last named, leave was given to counsel to file briefs in support of their respective contentions, and briefs were duly filed and the cause was taken under advisement.

On October 31, 1903, pursuant to the continuance of October 14, 1903, aforesaid, the said hearing was resumed. Defendant was brought before me, the said commissioner, at the United States court room in the said district, at the city of Indianapolis, by H. C. Pettit, marshal, and the defendant being present, and the demanding government being represented by J. J. M. La Follette, Esq., its counsel, and the defendant by Henry N. Spaan and Ferd Winter, his counsel, the court rendered the following opinion and decision; that is to say:

In the Matter of the Proceeding for the Extradition of James Lynchehaun.

On August 24, 1903, a complaint was filed with this commissioner on behalf of the British government demanding the extradition of the prisoner upon the charge that having been convicted in Ireland of the crime of assault with intent to murder and sentenced to penal servitude for life, he has escaped and was still at large. Upon this complaint a warrant issued directing the marshal to bring the prisoner before the commissioner, to the end that evidence of his criminality, within the terms of the British treaty, be heard and considered. The arrest was made. After submitting a part of the evidence, the counsel for Great Britain dismissed the proceedings and caused a second warrant to be served which had been issued previously by a New York magistrate. To test the power of the marshal in Indiana to execute the New York warrant, the prisoner sought a writ of habeas corpus before the Honorable Francis E. Baker, Judge of the United States Circuit Court for the district of Indiana. The writ was granted. Thereupon a third complaint was filed. Upon this complaint Judge Baker issued his warrant directing that the cause be heard by this commissioner. Accordingly the evidence has been heard and considered. From this evidence it must be determined whether or not the prisoner shall be committed to the executive department of the United States to be surrendered. Before the commitment can be made the commissioner must be satisfied that the prisoner is the convict whose extradition is sought; that he is probably guilty of the crime of which he was convicted; that his sentence has not been executed; and, finally, that, within the meaning of the treaty, the offense for which

he is to be punished if he shall be extradited, is not "of a political character."

It should not be necessary to say that these questions must be determined upon the evidence before the court; and that the stories told in the press and elsewhere for the purpose of influencing public sentiment for and against the prisoner are no part of this case.

The Facts Proved.

From the evidence submitted I find that the following facts have been proved:

On October 6, 1894, James Lynchehaun assaulted his landlord, Agnes McDonnell, with intent to kill her. Of this he was convicted on July 15, 1895. He was sentenced to penal servitude for life and was in prison, executing the sentence, until September, 1902, when he escaped and found his way to Indianapolis. The record of his conviction establishes the probable criminality of which the treaty requires proof. That the prisoner is James Lynchehaun and that his sentence is still unexecuted are facts no longer disputed. There remains but the one question,—whether, within the meaning of the treaty as read, in the light of the precedents and of the law, this assault was "an offense of a political character." If it was, the prisoner must be discharged; if it was not, he must be committed to jail to await final action by the secretary of state, and the President of the United States.

For the purpose of proving that the offense was of a political character, and because the English rule very properly admits all evidence which may be tendered to show that the crime was of such a character (1 Consol. Dig. Quebec, 602; Re Rosenbaum (Montreal), Q. B.,

1874; 20 Los. Can. Jur. 165; Hawley on Extradition, page 16) the prisoner was permitted to tell his story of the circumstances attending the assault and describe the trial that resulted in his conviction. While his story was not taken to contradict the record of conviction, nor to mitigate the crime, it may not be amiss to say that even if it were admissible for that purpose, it could not have that effect in law. A blow struck by one of a party of conspirators, which is followed directly and by prearrangement by other blows inflicted by others in the conspiracy, even though the first blow, taken alone, were only an ordinary assault and a fatal result were not originally intended, would become, nevertheless, an act of manslaughter or of murder, if the succeeding acts in the conspiracy should result fatally. We have no evidence of the extent of Mrs. McDonnell's injury save in the record of the Irish court that the prisoner "wounded her with intent to murder," and in his own statement that his blow was followed by a kidnapping in which perhaps fifteen took part, and by "a very bad beating and a bad kicking" by a party of men and women.

For the purposes of this hearing it is proved that the prisoner was guilty of the crime of assault with intent to kill, and that this crime is identical in Ireland and in Indiana. (See *Queen* v. *Reno*, 4 Prac. R., Ont. 281.)

Evidence was received to show the social and political conditions in the county where the crime was committed, and throughout Ireland, from 1881 to 1894, and the court was asked to take judicial notice as a historic fact that these conditions have prevailed in Ireland for a hundred years.

The scene of the crime was Achill Island. It is a desolate island, fifteen or twenty miles long and thirteen miles wide, made up of mountain and bog land, and so

barren that perhaps less than one per cent. of the land is under cultivation. It affords a meager living for the twenty-three hundred families of tenants that occupy it, and little or no income for the six landlords that own it. Of these landlords three were absentees, and three, nominally residents, spent much [illegible]eir time abroad. Upon Achill Island, and throughout a large part of Ireland, the feeling between the tenants, forming one class or party, and the landlords, forming another, was very bitter. The landlords had their "Landlords' Protective Association," to which the Achill Island landlords belonged; and the tenants had a number of societies, chief among which were the Land League and the Irish Revolutionary Brotherhood. The avowed purpose of the Land League was publicly and by lawful means, through petition, memorial, and legitimate agitation, "to oppose the oppression of too exacting landlords" and to make "the ownership of the tenants permanent and safe, beyond the oppression of the landlords." The Irish Revolutionary Brotherhood, made up of a smaller number within the membership of the League, was a secret order into which none but able-bodied men, between the ages of eighteen and forty-five, were admitted. As declared by various witnesses who belonged to the order, its purpose was "to overthrow the dominion of England and its power over Ireland," "to free Ireland from English rule," to resist the military and constabulary by intimidation and by force, to prevent evictions, terrorize landlords, and "put England out and form a republican government." Its plan was to arm its members, and drill them, and, waiting until England should become involved in war with a first-class power, seize that opportunity to rise and "strike the blow for an Irish re-

public." Meanwhile agitation was to be continuous, so as to keep the idea of revolution always before the people.

Under the direction of the Revolutionary Brotherhood large assemblages of people were held. As many as three thousand attended some of these meetings. Here the common expression of sentiment took such form as "To hell with the landlords," "Damn the landlords," "Down with the landlords." To the landlords such epithets were applied as "British spies," the "Foreign element," "England's garrison," and "the governing class." The speakers discussed "the wrongs of the people" and urged their hearers to drive out the representatives of England, soldiery and landlords, to shoot them or get rid of them in any way, to overthrow English rule in Ireland, to resist the government "as Emmet did," to get new laws and establish a government of the people.

Accounts of the brotherhood and of the dispersion of its revolutionary assemblages in Achill Island were given by the following witnesses who belonged to the brotherhood, namely: Conway, Vesey, McNamara, Corrigan, Lynch, and the prisoner, and descriptions of similar meetings in other parts of Ireland were given by witnesses O'Mahoney and Donnelly.

The speeches at these gatherings were inflammatory. Members of parliament were among the orators. At a meeting on Achill Island one of these speakers aroused the people to great heat by his references to the death of Emmet and his appeals to his hearers to organize and strike the blow for liberty. Irish legislation, he declared, was unjust; the landlords were robbers, and the land should belong to the people. The speaker and his wife and others on the stage were arrested and the audience was scattered.

Incited by these addresses, the people destroyed barns, fishing stations, boats, cattle houses, and pounds; burned the homes of the landlords, and assaulted landlords, bailiffs, constables, sheriffs, and soldiery, killing many of them. They demolished the bridges and roads to block the approach of troops and make evictions impossible, poisoned the springs of water, burned the pasturage, cut off the tails of cattle, pushed cattle from cliffs into the sea, and seized arms and ammunition from the houses of the bailiffs. In these riotous proceedings women as well as men took part. At night, two or three times a week, men were drilled in military tactics. So thoroughly had they organized their opposition to the established order of things that evictions could only be made with the aid of large bodies of armed men. After one eviction, described by the witness Donnelly, the people openly advocated killing the sheriff and blowing the police to pieces, and so crushing landlordism at once. "They ought to be shot, killed, driven out of the country; they are nothing but robbers."

One of the witnesses, a reputable citizen of Indianapolis, and a former resident of Achill Island, testified to the character of these assemblages and the part the prisoner took in them. I quote from his story:

(*From the testimony of Thomas J. Lynch.*)

Q. (By Mr. Spaan.) Now, what was the contention of the tenants as to what rights they asserted over the land? What did they claim?

A. This land came down to them from time without record, from their great-great ancestors, and they naturally felt that it belonged to them; by right of title it belonged to them, and their ideas were to banish by any means whatever; to banish them from the place so that the lands would belong to the people.

Q. Were those matters spoken of in public meetings?

A. Why, certainly; that was the drift of those meetings and the object of them.

Q. Now then, the tenants, their theory was that the land, having been occupied by them and their ancestors from time immemorial, the right belonged to them?

A. Yes, sir; they called those landlords usurpers, that usurped their rights, of what rightfully belonged to them.

After detailing the specific cause of complaint for the charging of rent on pasture land that theretofore had been common, the examination continued:

Q. Now, you may state what expressions of feeling you heard among the people as the result of that conduct?

A. Well, the expressions of feeling were that they should do anything, burn them out, kill them out, do anything in order to banish them from the place so that they could get the place to themselves.

Q. Were those acts of the landlords spoken of at those meetings?

A. Certainly.

Q. And how were they received by the crowd?

A. Received with cries of "Banish them, burn them out, get rid of them any way."

Q. Was that conduct characteristic of all of those meetings that you were at?

A. All of those meetings. Yes, sir.

Q. In conversation with people over this island, or at their meetings at other places where you got together, you may state whether or not there were expressions of a similar character used?

A. It was always the same.

Q. What was the general feeling, then, of the people, of that class of people that you have described, towards the landlords?

A. Why, the general feeling towards the landlords was harsh, and they considered the landlords the English representatives in Ireland, and their feeling towards them was just the same as towards the English govern-

ment, and their ultimate object was to banish both out of the country and form a government for the people and by the people.

Q. Now, I will ask you if those matters, if those doctrines of self-government, whether or not they were proclaimed in those meetings?

A. Only in Irish, because if they were spoken in English it was treason.

Q. They were talked in Gaelic?

A. They were talked in Gaelic; if talked in English they would be arrested.

After stating that he had known the prisoner in Ireland, had attended meetings addressed by him, and had heard his speeches, the witness continued as follows:

Q. Now, what were the leading ideas in his thought—in his addresses?

A. To, if possible, procure the land for the people.

Q. And anything else?

A. And, as a general run of all meetings, his talk was, if possible, to procure the land for the people and break the power of the landlords, and in that way the power of the English government in the place.

Q. Now was anything said in his advocacy of any particular form of government?

A. Not in open meetings in the English language; if he talked anything like that it was done—

Q. (Interrupting.) Did you hear him talk in Gaelic?

A. I heard him talk that in Gaelic, or the Irish, as we call it.

Q. Was that at a meeting of the Irish tenantry, at a meeting of the Irish?

A. Yes, sir.

Q. What did he say in Gaelic on those occasions?

A. He said as much as that, by overthrowing the landlord power it was the first step towards overthrowing the English government and in that way establish a republic like the United States.

Q. Now, you may state if you know whether or not he was considered a leading character among your people over there in Ireland on those subjects?

A. He certainly was.

The prisoner was both an agitator and an organizer. He had been a member of the Land League and of the Irish Revolutionary Brotherhood for thirteen years, serving in official positions in each. His hostility toward the landlords and the authorities was known. He was watched by the police. No doubt, to the authorities he was a very troublesome character whom they deemed deserving of severe punishment should his advocacy of lawlessness ever lead him to crime.

As might be expected, meetings like these had to be forbidden by law. "The Criminal Law and Procedure (Ireland) Act" of 1887, in force until after 1894, empowered the lord lieutenant to establish "proclaimed districts," where something like martial law prevailed. By this act one who took part in riots and unlawful assemblages was severely punished. Penalties were imposed and summary jurisdiction was conferred to try charges of intimidation, of inducing tenants not to pay rent, of conspiring to boycott trade, of wrongfully resuming possession after eviction, of obstructing eviction, and of inciting others to any of these acts. Provision was made for transferring trials to a county where the offender was a stranger and hearing them before a special jury; and for the search of suspected premises without specifying the locality in the search warrant. The act gave to the lord lieutenant the power to declare any association formed for the commission of these or other offenses to be dangerous and to punish any who might be convicted of taking part knowingly in any meeting of such association. "Association" was declared to mean "Any combination of persons, whether known by any distinctive name or not." Proclamation by virtue of which these sweeping changes in the criminal procedure took place became effectual at once throughout Ireland upon

publication in the Dublin Gazette. It was retroactive as to many of the offenses to which it related. This and like statutes show that the Britsh parliament recognized that Ireland was in a state of unrest; that this unrest was due to agrarian agitation, and that the ordinary procedure of the criminal courts was powerless to maintain a condition of peaceful submission to governmental authority. In a sense, this revolt of tenant against landlord was an assault upon the political and social order of the state.

Achill Island was in a proclaimed district. At one time a large part of Ireland was so proclaimed. Pursuant to this law, assemblages of the tenantry were broken up by force, as many as four thousand troops taking part on one occasion and riding armed through and over the people. One witness testified to having seen fourteen mass meetings dispersed in the year 1892. This suppression of meetings was continuous until after October, 1894. Expressions of hatred toward the landlords were heard everywhere among the Achill Island tenants down to that time. The tenantry had been aroused by what they considered cruel wrongs at the hands of the owners of the soil. Evictions had been frequent and had been accompanied with destruction of the property both of landlords and tenants. These evictions were described on the witness stand. Out of holdings which had passed from father to son from time immemorial, residents of the island had been dispossessed, resisting the armed constabulary, militia and bailiffs with violence of all sorts. Once evicted they could secure no other holdings near by and were left to the charity of the neighbors, the alms of the church, and the shelter of the poorhouse. On the McDonnell estate the tenants were rebellious because of prosecutions and punishment for

trespass, evictions, and demands for higher rents, charges for sea weed, grazing, and turf, the right to which the tenants had always claimed. Vile names were given to Mrs. McDonnell. She became, in view of the islanders, the representative of a class whom they must drive out. Being in a state of sporadic insurrection, the tenants demanded concessions that they knew they could not have and made claims beyond all law and reason—none the less sincere, perhaps, because unreasonable—asserting ownership of lands that had been held adversely to their claims since the time of Cromwell. Of the five thousand islanders, almost all of the men belonged to the Land League and four hundred were members of the Irish Revolutionary Brotherhood. One hundred and seventy of the Brotherhood lived on and near the McDonnell estate.

Whether this island was peculiarly a center of revolutionary sentiment, or was typical of the poorer portions of Ireland, is not clear. There was evidence that the conditions in Achill Island were generally prevalent. And it is a fair inference from the stringency of the laws that insurrectionary sentiment existed in all parts of the kingdom. The land question was the only political question before the Irish people. Legislation intended to relieve the strain seems to have increased it, and the more the rebellious spirit of the tenantry was curbed the more lawless it became.

In 1894 the island tenantry broke out into another of their occasional uprisings. On October the second, a delegate meeting of the Irish Revolutionary Brotherhood was held. Here met fifteen or sixteen delegates representing the entire tenantry of Achill Island and including the prisoner, who was a district organizer for the Brotherhood. Five of the delegates rented from Mrs.

McDonnell. For some time her exactions, prosecutions, and evictions had been considered, and schemes of redress had been planned. This time the discussion was closed and the plan of campaign carried out a few nights later was adopted. Her barn and her house were to be burned, and an effort was to be made by the tenantry to frighten her. The sentiment was expressed that if she were a man she would be shot. Lots were drawn to determine which one of the members should fire the barn, and which should fire the house; and three were chosen by lot to commit the personal assault. The prisoner was not one of these. The story is that these plans were to be seconded by the tenantry in general. A few minutes after eight o'clock, on the evening of October the sixth, the fire broke out, and the prisoner, who was then at his home, went at once to the scene. There he found about half of the McDonnell tenantry. As the prisoner and his landlord stood in the midst of the excited crowd of men and women who were engaged in spreading the fire while they pretended to extinguish it, the prisoner struck her with his fist. She staggered into the arms of a party of men and women, and in the melee she was badly injured. Among these were the three men who had been selected by lot to punish her. The only motive of which we have direct evidence is to be found in the prisoner's testimony. I quote:

Q. Now, I will ask you if in your conduct that night you were actuated at all by any motive of personal feeling directed against Mrs. McDonnell on your part?

A. Not the slightest personal motive.

Q. And what was done there, you may state what that was the result of.

A. That was the result of the combination of the tenants and of the Irish Revolutionary Brotherhood men.

Q. Now, what was the object in view in treating her

in that way that was discussed at the meeting of the Irish Revolutionary Brotherhood?

A. To send her back to England, sir, to send her out of the country back to England.

Q. And what you did there that night, you may state whether or not that was done in furtherance of carrying out the plan that you had advocated from the public platform, that is, to regain the lands of Ireland for the Irish, to drive out the landlords, and establish a republican form of government in Ireland?

A. That was the sole and only reason.

Q. Did you have any personal motives at all against the woman as an individual, apart from this general motive?

A. Not the slighest.

Q. So far as you know, did any of the parties have any personal grudge against the woman?

A. Not personally.

Q. Did you talk with them on the subject?

A. I knew the feeling of every man, woman, and child on the estate; I knew their feelings so far as the tenants were concerned.

Some years before the prisoner had been in her employ as a veterinary surgeon and had been discharged. This had been his sole employment from her. He swore that he had had no personal dispute with her since that time, although in common with the other tenants he had rebelled against what the tenants considered her injustice toward them. The motive inferable from this might well be considered to be a class-motive as well as a personal one.

The prosecution of the prisoner was conducted by the attorney-general of Ireland, who came from Dublin to Castlebar for the purpose. The defense claims that this was a recognition by the government of the political character of the crime and, in view of the fact that the attorney-general challenged all jurors who were small

tenants and all who were members of the Land League, amounts, the defense says, to a practical construction that the offense was political. The full force of this conclusion is hardly justified. That the point is entitled to some consideration, however, is decided in the leading case of Re Castioni, L. R. (1891) Q. B., page 149.

The testimony of the prisoner as to the final act is uncontradicted, and it is unsupported. Nevertheless, upon many material phases of this case, phases tending to establish his defense, his story is supported by the uncontradicted evidence of other witnesses. If it were not for this corroboration, a decision of this case might be harder to reach. This prisoner's first oath in the court that was to hear his plea for liberty was a denial of his identity. This must have been deliberate perjury. One is apt to think that a political refugee should be a hero and a patriot. And much has been said in this trial about Robert Emmet. It is a far cry from that immortal dreamer to the agitator who, after his cowardly assault upon a defenseless woman, seeks to charge against his unhappy associates the odium of a detestable crime.

The Commissioner's Duty to Decide as to Political Character.

It has been argued with some force that the magistrate has no power to decide whether the offense on account of which extradition is sought is political, but that he is bound to leave this question to the President of the United States and the secretary of state. I am convinced that, having been designated by the statute and authorized and commanded by the court to hear and consider the question of criminality under the treaty, I am in duty bound to decide whether this was a political offense.

The authorities all seem to support this view (Re Ezeta, 62 Fed. Rep. 972, 996; Re Castioni, L. R. (1891) Q. B. 149; Hansard, Vol. 202, page 300) and I shall take the responsibility of exercising the power which the law has conferred upon me.

We must consider all the facts and then as a question of law determine whether the offense was an ordinary crime or whether in the light of the circumstances leading up to it, it was political in its character.

It is not a question of how detestable the acts were, nor of whether or not they have been punished adequately, nor of whether the trial in 1895 was a fair one. The question is one of law to be determined according to those principles of justice which we find in the decisions of the courts and according to the definitions that jurists have presented for our consideration.

The Definitions of "Political Offense."

There are not many of these definitions. Nor are the cases in which they are found much like the one under consideration. The definition adopted by Justices Denman, Hawkins, and Stephens, of the English Court of Queen's Bench, in the Castioni case, is taken from Justice Stephen's History of the Criminal Law of England. So far as it can be made applicable to the facts of this case it may be deemed to come with the highest authority. "The expression" (political offense) the court says, "ought to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of political disturbances."

Re Castioni, L. R. (1891) Q. B. 149, 17 Cox, Cr. L. Cases, 228, Snow's Cases on Int. Law;

2 Stephen's Hist. Crim. Law in England, 70, 71.

This definition is approved by our federal court, *Re Ezeta*, 62 Fed. 972.

In discussing this subject in his leading cases on International Law (2d Ed.), page 40, Pitt Cobbett, says:

"Some offenses are from their very nature excluded" (from extradition). "Such would be high treason; riots for political purposes; seditious libels and conspiracies." "There must be two parties in the state, each striving to impose its own government on the other." *Re Meunier*, L. R. (1894) Q. B. 415.

A standard French authority declares political offenses to be "a name given to offenses tending to disturb" (ebranler) "the political or social order of the state." Kirchner L'Extradition.

Some light is thrown upon this subject by the debates in the British parliament (1866 to 1870) on the "Extradition Treaties Amendment Act" (184 Hansard, 2004, 2006, 2109, 2115). I quote:

Lord Stanley: "If a man were killed in a riot, or in an attempt to excite a tumult or popular insurrection, that probably would be regarded as a political offense."

Sir Francis Goldsmid: "An offense committed for the promotion, prevention, or obstruction of any political object."

John Stuart Mill: "Any offense committed in the course of, or in furtherance of any civil war, insurrection or political movement."

Distinguished from Assassination.

Political crimes are distinguished from assassination in the Pall Mall Gazette in this that "it is an essential characteristic of a political crime that it takes place openly and without attempt at concealment."

Quoted by F. N. Stone in 43 New Englander, 224.

Distinguished from Anarchy.

A clear distinction has been made by learned writers between political offenses and the crimes of anarchists. Those participating in a political offense, although they may seek to overthrow the social or political order, are planning at the same time to substitute some other form of government or social organization in its place. The anarchist, on the other hand, is generally an assassin. His crime is done in secret. He assails not only the existing government, but all government. This distinction has been recognized by the authorities. It follows that the recognition of the right of asylum for political refugees does not involve the protection of those whose aim has been to destroy government rather than merely to change it.

In seeming conflict with these judicial definitions there are a few academic discussions in the popular magazines where the contention is made that the exemption of "political offenses" ought to be limited to crimes committed in open warfare. It is nowhere stated that the exemption is limited in that way. This court is to take the law as it believes it actually is and not as it ought to be. And in deciding what it is, it must recognize as authoritative

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the judgments of courts of law rather than the opinions of students and doctrinaires.

RULES FOR INTERPRETING EXTRADITION TREATIES.

In applying these defintions to the facts of the case, to determine whether extradition shall take place, we must follow certain rules of interpretation.

"In my opinion," said a Canadian judge, "treaty regulations between states should be executed in good faith in a liberal spirit with a disposition to facilitate the obtainment of justice."

Ex Parte Phelan (Quebec), 6 Leg. News, 261.

I may say in passing that "the obtainment of justice" means the protection of the accused as well as the protection of society and contemplates acquittals as well as convictions.

A treaty is to be liberally construed so as to carry out its manifest purpose, "so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence."

Tucker v. *Alexandroff*, 183 U. S. 424, 437.

"I incline to think," says the chief justice of the Canadian Court of Appeals, "that there is a substantial difference between the manner in which we should deal with the law and with the facts in an extradition case. It is sufficient if the facts before us establish a case which if true is reasonably sufficient to put the accused upon his trial; but it is, I apprehend, incumbent upon us to see that the act charged constitutes an extradition offense, and unless it is established as a matter of law that it is so, the accused ought not to be surrendered."

Spragge, C. J., in *Re Hall*, 8 Ont. App. 31, 39.

The effect of this decision is to put on the demanding government the burden of proving that the crime is extraditable.

THE BURDEN IS ON THE DEMANDING GOVERNMENT.

These principles of interpretation lead to the conclusion that whatever may be the rule as to reasonable doubt, or the burden of proof, the magistrate must be satisfied that the offense is not political in its character before he can be justified in surrendering the prisoner. As still another Canadian judge put it: "My duty in the present case is to see in the first place whether the offense is non-political." *Re Levi,* L. R. (Quebec) Q. B. 151.

In the Ezeta case, Judge Morrow, of the United States Court, intimates that the question whether or not the offense is political shall be decided "according to the provisions of the law which shall prove to be most favorable to the accused." This is the rule as the court quotes it from the draft of the convention of the Montevideo, adopted in 1888. Judge Morrow says:

"The article cited may be at least accepted as expressing the wisdom of leading jurists and diplomats. The article is important with respect to two of its features: (1) It provides that a fugitive shall not be extradited for an offense connected with a political offense, or with an offense subversive of the internal or external safety of the state. (2) The test as to the character of the offense shall be made according to the provisions of the law which shall prove most favorable to the accused. The second provision of the article is founded on the broad principles of humanity found everywhere in the criminal law, distinguishing its administration with respect to even the worst features of our civilization from the cruelties of barbarism." *Re Ezeta,* 62 Fed. 972, 999.

If we are to construe the treaty liberally "so as to carry out its plain purpose," we must recognize that the clause exempting political crimes must have the same liberal construction that is to be given to the rest of the treaty. This is the only forum where the prisoner can try the question as to the political character of his crime. After he shall have been surrendered it will be too late to show by way of defense that his crime was political. Here and now he is entitled to a complete trial upon this one issue, for here alone is the issue of value to him. It follows that being tried upon an issue the determination of which may result in his return to a life imprisonment, he is entitled, on this one issue at least, to the guaranties and presumptions which American courts give to one accused of crime. It is as if he were charged with having done an act whose criminality consisted in its being non-political. The issue on that charge is clearly defined. If proved, he must be imprisoned for life; if not, he must be released. Where the law presents a choice of two conclusions, equally potent, that one must be taken which is "most favorable to the accused."

The demandant has argued that a murderous assault can not possess a political character if committed against a private citizen, unless committed in time of war. The argument is unsound. If a criminal assault were ever political it would seem that the very fact that it was committed against an official would make it so. And yet the treaties with Belgium, Luxemburg, and Russia declare that an assault "against the life of the head of the government shall not be considered a political offense." In the Castioni case the man killed was not an officer.

It is also suggested by way of argument that a crime is not political if done in a hopeless cause. The cause,

in other words, must have the dignity of real warfare. Surely the followers of John Brown or of Robert Emmet, had they escaped to a foreign country, could not have been extradited. The offenses were political which they committed in seeking to carry out their visionary assaults against established government. In the Emmet uprising, chance passers-by were assaulted by Emmet's followers and injured or killed, when their assailants must have known that such acts as these could not by any possibility change the government. There never was a moment when Brown or Emmet could have had reason to hope for success, yet the acts of their followers were political acts.

The American revolution grew out of a long period of social and political unrest caused by the oppression of alien rulers. For many years before the war of the revolution the loyalists suffered cruelties unspeakable at the hands of the American colonists. These brutalities form a striking parallel with the acts done by the tenantry in the west of Ireland between 1880 and 1894. The manes and tails of horses were cut off; men were tarred and feathered, ridden on fence rails, gagged and bound for days at a time, pelted with stones, advertised as public enemies, and boycotted. Bullets were shot into their bed rooms; valuables were extorted to save from violence; their houses and their ships were burned. They were compelled to pay the guards who watched them in their houses, and when carted about for the mob to stare at and abuse, they were compelled to pay something at every town. In one instance, the victim sought legal redress. A party of people disguised as Indians broke into his store, destroyed all his books and papers, laid waste his property, and threatened his life. Shortly afterward he went insane and died.

In describing these occurrences, an author (Sydney George Fisher) says:

"Any accidental circumstances would cause these visitations and often the victim was not as politically guilty as some of his neighbors, who by prudence or accident, remained unharmed to the end of the war."

True History of the American Revolution, page 156.

Many of these things were done ten years before the war.

A like parallel is found in occurrences preceding the French revolution. However odious the offenses done, there can be no doubt that in the case of the American colonists and of the French peasantry many of the acts committed were political in their character.

It is not necessary to a decision of this case either that we justify the movement of these tenants as patriotic or that we condemn it as foolish. They were fanatics who hoped to better their lot by upsetting existing conditions, social and political. In the landlord they saw the cause of all their misery. They believed that landlordism meant British rule. Back of the statute law, and back of the juries chosen under that law, and back of the courts, they thought they recognized the influence of the property-holding class, and they believed that in their assaults upon landlordism they were rebelling against hostile laws, hostile juries, and hostile courts. In the minds of this semi-rebellious tenantry, excited to frenzy by the appeals of unscrupulous agitators, and made desperate by the burden of poverty laid upon them by a system that was half social and half political, but, to their view, wholly hostile, it is easy to trace the growth of the idea that the mobbing of landlords, the expulsion

of bailiffs and the shooting of sheriffs and constables might lead in time to a reform in the legislation that was hateful to them and a change in the governing class, and perhaps to a parliament of their own to make laws for the tenantry and enable the tenantry to control the courts.

The Castioni case (Re Castioni L. R. (1891) Q. B. 149) is the leading case on the subject of the extraditability of political offenses. In this case Sir Charles Russell appeared for the prisoner, and the Attorney-General, Sir R. Webster, appeared for the demanding government. The decision is by three of England's most famous judges, Denman, Hawkins and Stephens. The opinions of the judges and the argument of counsel are instructive.

The fugitive, Castioni, had been drawn by accident into an assault upon the public armory in a little Swiss village, from which the men were attempting to take firearms. In the course of the riot a man was killed. The man's death was in no sense necessary for the success of the political movement in which he was sacrificed and it was considered by all parties to be a misfortune. Justice Denman said:

"The question really is whether upon the facts it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character, with a political object, and as part of the political movement and rising in which he was taking part. Now the only shadow of a suggestion of evidence to the contrary, I think, amounts to very little and it comes to really a nice disquisition as to the facts of the case as to what was taking place at the exact moment at which the shot was fired. . . . There is nothing in my judgment, to displace the view which I have taken, that at the moment at which Castioni fired the shot the reasonable

presumption is . . . that he at the moment, knowing nothing about Rossi" (the person killed), "having no spite or ill-will against Rossi, as far as we know, fired that shot; that he fired it thinking it would advance, and intending it to be in furtherance of the very object which the rising had taken place in order to promote, and to get rid of the government."

Justice Hawkins, said:

"I can not help myself thinking that everybody knows that there are many acts of a political character done without reason, done against all reason; but at the same time one can not look too hardly, and weigh in too golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are contrary to reason, but, nevertheless, an act done of this description may be done for the purpose of furthering and in furtherance of a political act and a political rising, even though it is an act which may be deplored and lamented as even cruel and against all reason by those who can calmly reflect upon it after the battle is over."

Other offenses deemed in reported extradition cases to be political in their character may be referred to as supporting the authority of the Castioni case.

In the Cazo case (1 Moore on Extradition, 324), Mexico sought to extradite Francisco J. Cazo and his accomplices. It seems that thirty or forty raiders had taken and kept possession of a little Mexican town for two or three days, fighting the citizens, seizing horses and other property, and doing acts of violence of all sorts. They kept shouting, "Hurrah for Don Francisco J. Cazo, and death to the Garra party." There was no effort to conceal the identity of the raiders. But they were only raiders, with no government to establish. The secretary of state, Mr. Thomas F. Bayard, held that the

affair was an avowed partisan political conflict and the raiders could not be surrendered.

In the Ezeta case (62 Fed. R. 972) the crimes for which extradition was sought consisted of murder, assault with intent to kill, and the robbery of a bank. The crimes were done by ex-President Ezeta and others, fugitives who had been part of the government of Salvador, had been overthrown in revolution, and in their flight had robbed the bank to pay Ezeta's soldiers. The United States Court held all these acts political, notwithstanding the failure of Ezeta's cause, and refused to return the fugitives.

One other case may be mentioned. That is *Ornelas* v. *Ruiz,* 161 U. S. 502. The crimes charged were murder, arson, robbery, and kidnapping. A band of one hundred and forty armed men crossed the line from Texas into Mexico, attacked forty Mexican soldiers, killing some and injuring others, burned barracks, assaulted private citizens, and seized their horses, burned their houses, and extorted small sums of money from women. They were bandits without flag or uniform, but wearing a red band on their hats. The commissioner held the offenses extraditable and the district judge sought to overrule the decision of the commissioner, holding that the offenses were political. The supreme court ruled that if the finding of the commissioner had any evidence at all to support it was final. I only mention it to show that the judge considered these acts to be political.

The number of reported cases in which this question is involved is surprisingly small. Extradition was denied on political grounds in all but one. In that one the higher court held likewise, but its holding was ineffectual. It is true that all are cases where men were armed and engaged in a quasi military struggle or at least an

armed riot. There is no case in which extradition was either granted or denied on political grounds where the uprising involved the hopeless struggle of a people to whom arms were denied. The present seems to be the first case. And it must be decided upon principle and according to the judgment and conscience of the magistrate.

Having considered the precedents and selected our definitions, let us apply the definitions to the facts of this case. Crimes "incidental to and forming a part of political disturbances," "riots for political purposes," "offenses tending to disturb the political or social order of the state," "two parties, each striving to impose its own government on the other;" these definitions are authoritative. "Done in a riot or in an attempt to excite a tumult or popular insurrection," "offenses committed for the promotion of any political object," or "in the course of or in furtherance of an insurrection or political movement." These are less authoritative, but they are illuminating. Do they fit the case?

It is evident to me that the assault on Mrs. McDonnell was incidental to, and a part of, a popular disturbance; that the popular disturbance, including the prisoner's part in it, had its origin and cause in a popular movement to overthrow landlordism and was done to further that movement, and that this movement, futile though it was, did disturb the political and social order of Ireland; that these people would have been in a state of open insurrection had not the right to bear arms been denied them; and in fine, that the riot of October the sixth was for political purposes and that its participants were engaged in a partisan conflict whose object was a change of laws and an upsetting of existing political conditions.

The real test lies deeper than definitions. It is this: Would the crime have been done had there been no political motive and no concert of action to effect that motive? Would the fire and the ensuing riot have occurred save for the long chain of moving causes that preceded it—the discontent of the tenants as a class, the agrarian agitation, the enactment of odious laws, the disagreements between the various tenants in the island and their landlords, the knowledge that like disagreements existed all over Ireland, the dispersing of the Brotherhood meetings and the arrest of its speakers; and, finally, the meeting of October the second, when the delegates chosen by four hundred members of a revolutionary order determined to drive this landlord out of the country. I am convinced that these things were all moving causes that led up to the climax of October the sixth, and that their relation to the riot and the assault was so intimate that they lent their character to the assault itself.

Disgraceful though an assault on a woman must always be, I am convinced that under the terms of the extradition treaty with Great Britain this was an offense of a political character for which the prisoner can not be surrendered. Let him be discharged.

And thereupon the prisoner was by me discharged.

CHARLES W. MOORES,
United States Commissioner.

UNITED STATES OF AMERICA,
District of Indiana, ss:

The foregoing is a true, full and complete transcript of the proceedings had before me in said cause, to wit: the extradition proceedings against James Lynchehaun and of the judgment and findings therein rendered by

me as the same in fact occurred and as the same appear in the records and documents in my office, at the city of Indianapolis, in the said district.

Witness my hand and seal this 26th day of March, 1904.

(L. S.)

CHARLES W. MOORES,
United States Commissioner.

APPELLEE'S BRIEF

FILE COPY.

APR 2- 1904

JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 563.

HENRY C. PETTIT, UNITED STATES MARSHAL FOR THE DISTRICT OF INDIANA, *Appellant*,

v.

THOMAS WALSHE, *Appellee*.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR APPELLEE.

ADDISON C. HARRIS,
F. WINTER,
Attorneys for Appellee.

The Hollenbeck Press, Indianapolis.

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BRIEF FOR APPELLEE.

The appeal in this case is from a judgment by which the appellee was discharged upon a writ of habeas

corpus from arrest and imprisonment by the appellant, the marshal of the United States for the district of Indiana. The petition for the writ and the marshal's return thereto showed that appellee had been arrested upon a warrant issued by John A. Shields, United States commissioner for the southern district of New York and also commissioner to act in extradition proceedings, by which the arrest of one James Lynchehaun, to be brought before said commissioner at his office in the city of New York, was commanded in order that the matter of his extradition to the kingdom of Great Britain and Ireland as an escaped convict should be heard. Upon the hearing of exceptions to the marshal's return, which justified the arrest and imprisonment of the appellee solely by authority of the warrant referred to in the petition, the court below held that the appellee, having been arrested within the district of Indiana, could not be taken out of the district under said warrant for hearing of the complaint upon which the same was issued, but was entitled to be tried in the district of Indiana. No exception was taken by appellant to this ruling, and thereupon appellee was discharged.

The ruling of the court below in sustaining the exceptions to the marshal's return, and in discharging appellee from arrest, are assigned for error. The appellee has filed in this court an answer to the assignments of error accompanied by a certified transcript of proceedings had before Charles W. Moores, United States commissioner for the district of Indiana and commissioner appointed to act in matters of extradition, from which answer and transcript it appears that the appellee and James Lynchehaun are one and the same person, and that immediately upon the appellee being discharged upon the writ of habeas corpus

from which this appeal is prosecuted, C. Clyde Bayley, his Britannic Majesty's consul at the port of New York, upon whose complaint the warrant had been issued, immediately, without excepting to the decision of the court below from which this appeal is prosecuted, acquiesced in such decision and made complaint under oath to the Hon. Francis E. Baker, judge of the Circuit Court of the United States for the district of Indiana, by whom said decision had been made, asking that a warrant be issued for the arrest and extradition of appellee, by the name of James Lynchehaun, on the ground that he was an escaped convict, being the same matters, and not other or different, embraced in the complaint before Commissioner Shields, and his warrant thereunder, from arrest and imprisonment under which the appellee had been discharged as shown by the record in this cause; upon which complaint Judge Baker issued his warrant to the appellant, the marshal for the district of Indiana, returnable to the Hon. Charles W. Moores, United States commissioner for the district of Indiana, and also commissioner specially authorized to act in matters of extradition, under which warrant appellee was thereupon arrested by the appellant and brought before said commissioner, by whom the matter of said complaint was heard on the merits, and by whose judgment rendered therein on the merits, the appellee was thereafter, on the 31st day of October, 1903, discharged; which judgment is still in full force.

Points and Authorities.

I.

1. On every writ of error and appeal the first and fundamental question is that of jurisdiction, and the court, of its own motion, will refuse to proceed where want of jurisdiction appears on the face of the record.

Continental National Bank v. *Burford*, 191 U. S. 119.

2. The jurisdiction in this case depends upon whether the construction of a treaty is involved.

Act March 31, 1891, § 5, 1 U. S. Compiled Statutes, 1901, chapter 8*a*;

Cross v. *Burke*, 146 U. S. 82;

Ex parte Lennon, 150 U. S. 393;

Craemer v. *State*, 168 U. S. 124.

3. This case depends for its decision upon the construction of the statutes relating to fugitives from the justice of a foreign country, and regulating the appointment and defining the powers of United States commissioners. It does not involve the construction of any treaty.

§ 5270, 3 U. S. Compiled Statutes, 1901;

§ 19, Act May 28, 1896, § 621, 1 U. S. Compiled Statutes, 1901;

§ 1014, 1 Compiled Statutes, U. S. 1901;

§ 1, Act August 18, 1894. 1 Compiled Statutes U. S., p. 717.

II.

There was no exception to the ruling and judgment of the court below, but, on the contrary, the

British government, at whose instance the appellee was under the arrest from which he was discharged by such judgment, acquiesced in the judgment by procuring appellee to be again arrested and tried upon the same charge, before a United States commissioner for the district of Indiana, in accordance with the judgment of the court below in this case. This was a waiver of error in said judgment, and of the right to appeal therefrom.

Liebuch v. *Stahle*, 66 Iowa 749;
Gordon v. *Ellison*, 9 Iowa 317;
Carr v. *Casey*, 20 Ill. 637;
Holland v. *Commercial Bank*, 22 Neb. 585;
Wilson v. *Roberts*, 38 Neb. 206;
Brooks v. *Hunt*, 17 Johns. 484;
Ehrman v. *Astoria*, 26 Oregon 377;
McAfee v. *Kirk*, 78 Ga. 356.

III.

The answer to the assignment of errors shows that immediately upon the appellee being discharged from arrest under the warrant of Commissioner Shields, the British government, upon whose complaint that warrant had been issued, immediately procured the appellee to be rearrested upon the same charge, upon a warrant issued by Judge Baker, and brought before Commissioner Moores, of the district of Indiana, pursuant to the command of the warrant, by whose judgment, still in full force, appellee was acquitted and discharged upon the merits, after a full hearing. This judgment, while in force, is final, and disposed of the subject-matter. The court can not afford any substantial relief in the present case, which presents simply a moot question.

Tennnssee v. *Condon*, 189 U. S. 70–71;
Mills v. *Green*, 159 U. S. 653;
California v. *Railroad*, 149 U. S. 314;
Dakota v. *Glidden*, 113 U. S. 225;
Dinsmore v. *Express Co.*, 183 U. S. 120;
Codlin v. *Kohlhausen*, 181 U. S. 151;
Kimball v. *Kimball*, 174 U. S. 159;
New Orleans Flour Inspectors, 160 U. S. 170;
Washington, etc., v. *Columbia*, 137 U. S. 62;
Little v. *Bowers*, 134 U. S. 547;
San Mateo County v. *Southern Pac. R. Co.*, 116 U. S. 138;
Coryell v. *Holcombe*, 9 N. J. Eq. 650;
In re Treadwell, 111 Cal. 189.

IV.

The hearing of an application for the extradition of a fugitive from the justice of a foreign government, arrested upon the warrant of a United States commissioner, must be had in the district in which the alleged fugitive is found and arrested.

(1) United States commissioners are appointed by the district courts "at such places in the district as may be designated by the district court" and "shall have the same powers and perform the same duties as are now imposed upon commissioners of the circuit courts."

§ 19, Act May 28, 1896;
1 Compiled Statutes U. S., 1901, p. 499.

(2) Among these powers is the power to issue warrants for the arrest, and hear the evidence as to criminality of persons charged with being fugitives from the justice of foreign governments.

§ 5270, 3 Compiled Statutes, U. S., 1901.

(3) But the person to be arrested must be found within the limits of the commissioner's district.

Otherwise the provision that the person charged shall "be found within the limits of any state, district or territory," following the enumeration of the courts and magistrates authorized to act, and whose jurisdiction in some instances is limited by state, and in others by district and territorial lines, would be meaningless.

§ 5270, 3 Compiled Statutes U. S. 1901.

(4) The extradition of a fugitive from justice is a criminal proceeding. The evidence of criminality must be heard and considered.

Rice v. *Ames*, 180 U. S. 374, 375;
§ 5270, 3 Compiled Statutes U. S. 1901.

(5) As such it is within the statutory requirement that the officer issuing the warrant shall attach thereto a certified copy of the complaint, and upon arrest being made that the marshal shall take the defendant before the nearest United States commissioner or nearest judicial officer having jurisdiction to hear, and commit or take bail, who shall have jurisdiction as fully as if the complaint had originally been made before him.

§ 1, Act Aug. 18, 1894, chapter 301; 28 Stat. 416;
1 Compiled Statutes U. S. 1901, chapter 18, page 717.

(6) The defendant has a right to be examined as a witness in his own behalf, if he is a competent witness by the laws of the state in which he is found.

In re Farez, 7 Blatchf. 345;
Fed. Case, No. 4645.

In this case the court said: "The proceedings before a magistrate in this district in a case of extradition must be conducted according to the law of the state of New York, in the particulars in which such proceedings are not specially regulated by a statute of the United States."

(7) The commissioner failed to observe the mode of procedure designated by the law of the state of Minnesota, by refusing to permit the prisoner to examine witness in his own behalf, and it was held that his commitment was illegal.

In re Kelley, 25 Fed. 268.

(8) The competency of evidence is to be determined by the law of the state in which the hearing is had.

In re Charleston, 34 Fed. 531.

(9) The proceedings for arrest, hearing and commitment for trial, or discharge, of persons charged with crimes or offenses against the United States are required to be had agreeably to the usual mode of process against offenders in the state where such person is found, and after commitment in a district, other than that in which the offense was committed, the district judge issues a warrant for his removal to the district where the trial is to be had.

§ 1014, 1 Compiled Statutes, 1901;
In re Farez, 7 Blatchf. 345;
Fed. Case, No. 4645.

V.

If there were conflict between the treaty and the statutes, the latter, being later in enactment, would control.

Horner v. *U. S.*, 143 U. S. 570;
Head Money Case, 112 U. S. 580;
Whitney v. *Robertson*, 124 U. S. 190;
Chinese Exclusion Case, 130 U. S. 581.

VI.

But there is no conflict. The treaty itself has reference to and recognizes the territorial and governmental subdivisions of the United States.

1. "The evidence of criminality must be such as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed."

Article X of Treaty of 1842 between the United States and Great Britain.

8 Stat. at Large 572, 576.

(2) Under this, if the acts alleged to have been committed are not criminal by the statutes of the United States, resort must be had to the laws of the state.

Wright v. *Henkel*, 190 U. S. 40;
§ 1014, Compiled Statutes U. S. 1901;
In re Farez, 7 Blatch. 345;
Federal Case No. 4645.

VII.

The case *In re Henrich*, 5 Blatch. 414, Federal Case No. 6369, is the only case in which it has been held that the prisoner may be taken for hearing from the state in which he was found and arrested, to the state in which the commissioner was appointed and resides. In this case, as stated in the opinion of the court below in the case at bar, the court did not consider that the dual character of our government was recognized by the extradition treaties, and considered only the provisions of the 27th section of the Judiciary Act of 1789, limiting the power of marshals to execute precepts to their own districts, and of the 33d section, as to its provision for the removal of prisoners for trial from one district to another. Much weight is given to the fact that the warrant was issued by a Justice of the Supreme Court and directed to any marshal of the United States. The question was not involved or decided *In re Fergus*, 30 Fed. 607; nor in any other case, until the decision in the case at bar. The Act of August 18, 1894 (1 Compiled Statutes, 1901, ch. 18, p. 717), was enacted long subsequent to the decision in the Henrich case.

VIII.

The construction contended for by appellant involves the establishment of the power to arrest a presumably innocent man at his place of residence, and to remove him therefrom without any hearing as to the rightfulness of his arrest, to the most distant part of the country. He may be taken from New York to Alaska, or from Australia to

London. We submit that such a construction should not be adopted unless clearly required by the statute.

Respectfully submitted,

ADDISON C. HARRIS,
F. WINTER,
Attorneys for Appellee.

Supreme Court of the United States.

No. 563.—October Term, 1903.

Henry C. Pettit, United States Marshal for the District of Indiana, Appellant, *vs.* Thomas Walshe. } On appeal from the Circuit Court of the United States for the District of Indiana.

[May 2d 1904.]

Mr. Justice Harlan delivered the opinion of the Court.

This is a case of extradition. It presents the question whether a Commissioner specially appointed by a court of the United States under and in execution of statutes enacted to give effect to treaty stipulations for the apprehension and delivery of offenders, can issue a warrant for the arrest of an alleged criminal which may be executed by a marshal of the United States, within his District, in a State other than the one in which the Commissioner has his office. It also presents the question whether a person, arrested under such a warrant, can be lawfully taken beyond the State, in which he was found, and delivered in another State before the officer who issued the warrant of arrest, without any preliminary examination in the former State as to the criminality of the charge against him.

By the 10th article of the Treaty between the United States and Great Britain, concluded August 9th 1842, it was provided that upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, they shall "deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other." But by the same article it was provided that "this shall only be done upon such evidence of criminality as, *according to the laws of the place where the fugitive or person so charged shall be found*, would justify his apprehension and commitment for trial, if the crime or offence had *there* been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be

judge or magistrate to certify the same to the proper executive authority, deemed sufficient to sustain the charge, it shall be the duty of the examining that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive." 8 *Stat.* 572, 576.

A supplementary treaty between the same countries, concluded July 12th 1889, provided for the extradition for certain crimes not specified in the 10th Article of the treaty of 1842, and "punishable by the laws of both countries"; and, also, declared that the provisions of the above article "shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed. In case of a criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction, and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers." 26 *Stat.* 1508, 1510.

By an act of Congress, approved August 12th 1848, *c.* 167, and entitled "An act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivering up of certain offenders," it is provided (§ 1): "That in all cases in which there now exists, or hereafter may exist, any treaty or convention for extradition between the Government of the United States and any foreign government, it shall and may be lawful for any of the justices of the Supreme Court or judges of the several District Courts of the United States—and the judges of the several State courts, and the commissioners *authorized so to do* by any of the courts of the United States, are hereby severally vested with power, jurisdiction, and authority, upon complaint made under oath or affirmation, charging any person found within the limits of any State, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes enumerated or provided for by any such treaty or convention—to issue his warrant for the apprehension of the person so charged, that he may be brought before such judge or commissioner, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge under the provisions of the proper treaty or convention, it it shall be his duty to certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of said treaty or convention; and it shall be the duty of the said judge or commissioner to issue his warrant for the commitment of the person so charged

to the proper goal, there to remain until such surrender shall be made." "§ 6. That it shall be lawful for the courts of the United States, or any of them, *to authorize any person or persons to act as a Commissioner or Commissioners,* under the provisions of this act; and the doings of such person or persons so authorized, in pursuance of any of the provisions aforesaid, shall be good and available to all intents and purposes whatever." 9 *Stat.* 302.

And by section 5270 of the Revised Statutes—omitting therefrom the proviso added thereto by the act of June 6th 1900, *c.* 793, 31 *Stat.* 656, which applies only to crimes committed in a foreign country or territory "occupied by or under the control of the United States"—it is provided: "Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, *authorized so to do by any of the courts of the United States,* or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, District, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made." See also § 5273.

In the Sundry Civil Appropriation act of August 18th 1894 will be found the following clause: "*Provided,* That it shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offence, to take the defendant before the nearest Circuit Court commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof." 28 *Stat.* 416.

Under these treaty and statutory provisions, complaint on oath was made before John A. Shields—a Commissioner appointed by the District Court of the United States for the Southern District of New York *to execute the above act of August 12th 1848, and the several acts amendatory thereof*—that one James Lynchehaun was convicted, in a court of Great Britain, of the crime of having feloniously and unlawfully wounded one Agnes McDonnell, with intent thereby, feloniously and with malice aforethought, to kill and murder said McDonnell; that the accused was sentenced to be kept in penal servitude for his natural life; that in execution of such sentence he was committed to a convict prison in Queens County, Ireland, had escaped therefrom, and was at large; and that he was a fugitive from the justice of the Kingdom of Great Britain and Ireland, and within the territory of the United States. It is admitted that the present appellee is the person referred to in the warrant as James Lynchehaun.

Upon that complaint, Commissioner Shields, in his capacity as a Commissioner appointed by a court of the United States to execute the laws relating to the extradition of fugitives from the justice of foreign countries, issued on the 6th day of June 1903, in the name of the President, a warrant addressed "to any marshal of the United States, to the deputies of any such marshal, or any or either of them," commanding that the accused be forthwith taken and brought before him, *at his office, in the city of New York*, in order that the evidence as to his criminality be heard and considered, and if deemed sufficient to sustain the charge, that the same might be certified, together with a copy of all the proceedings, to the Secretary of State, in order that a warrant might be issued for the surrender of the accused pursuant to the above treaty.

This warrant having been placed for execution in the hands of the appellant, as Marshal of the United States for the District of Indiana, he arrested the accused in that State. Thereupon the latter filed his application for a writ of *habeas corpus* in the Circuit Court of the United States for that District, alleging that his detention was in violation of the Constitution, treaties and laws of the United States. The writ was issued, and the Marshal justified his action under the warrant issued by Commissioner Shields. Referring to the warrant and averring its due service upon the accused, the Marshal's return stated that the warrant was "regular, legal, valid and sufficient in law in all respects to legally justify and warrant the arrest and detention of petitioner, and, under the laws of the United States, it was and is the duty of this defendant to arrest and detain said petitioner, *and deliver him as commanded by said writ for hearing before Commissioner Shields, in New York city;* that said writ runs for service in the State of Indiana, although issued by a commissioner of the United States for the Southern District of New York, by reason of its being a writ in extradition; that

defendant is informed and believes, and therefore states the fact to be, that petitioner is the identical person commanded to be arrested by said warrant as James Lynchehaun; . . . and that it is by virtue and authority solely of said warrant that defendant holds and detains petitioner; that defendant proposes, if not otherwise ordered by this honorable court, to obey, as United States marshal for the District of Indiana, the command of said warrant as set out therein, believing it to be his duty as said officer so to do."

The accused excepted to the Marshal's return for insufficiency in law, and the case was heard upon that exception. The court held the return to be insufficient; and the Marshal having indicated his purpose not to amend it, the accused was discharged upon the ground that the Commissioner in New York was without power to issue a warrant under which the Marshal for the District of Indiana could legally arrest the accused and deliver him before the court of that Commissioner in New York without a previous examination, before some proper officer in the State where he was found. *In re Walshe*, 125 *Fed. Rep.* 572.

The appellee contends that this case only involves a construction of certain acts of Congress, and that, therefore, this court is without jurisdiction to review the judgment on direct appeal from the Circuit Court. *Spreckels Sugar Refining Co.* v. *McClain*, 192 *U. S.* 397, 407. We do not concur in this view. The treaties of 1842 and 1889 are at the basis of this litigation, and no effective decision can be made of the controlling questions arising upon the appeal, without an examination of those treaties and a determination of the meaning and scope of some of their provisions. A case may be brought directly from a Circuit Court to this court if the *construction* of a treaty is therein drawn in question. 26 *Stat.* 826, *c.* 517, § 5. The petition for the writ of *habeas corpus* and the warrant under which the accused was arrested both refer to the treaty of 1842, and the court below properly, we think, proceeded on the ground that the determination of the questions involved in the case depended in part, at least, on the meaning of certain provisions of that treaty. The construction of the treaties was none the less drawn in question because it became necessary or appropriate for the court below also to construe the acts of Congress passed to carry their provisions into effect.

We now go to the merits of the case. It has been seen that the treaty of 1842 expressly provides, among other things, that a person charged with the crime of murder, committed within the jurisdiction of either country, and found within the territories of the other, shall be delivered up by the latter country; and that the provision shall apply in the case of one convicted of such a crime, but whose sentence has not been executed. But both countries stipulated in the treaty of 1842 that the alleged criminal shall be arrested and delivered up *only* upon such evi-

the court, to take the prisoner at once from the State in which he was found and deliver him in New York, before Commissioner Shields, without a hearing first had in the State of Indiana before some authorized officer or magistrate there sitting, as to the evidence of the criminality of the accused. The Circuit Court adjudged that the Marshal had no authority to hold the accused in custody for any such purpose; and, the Marshal declining to amend his return and not avowing his intention to take him before a judicial officer or magistrate in Indiana for purposes of hearing the evidence of criminality, the prisoner was properly discharged from the custody of that officer.

For the reasons above stated the judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.